United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

2 cv

BRIEF FOR APPELLANT AND JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,721

DOROTHY HAYNES,

Appellant,

v.

HELEN COOLIDGE,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOSEPH D. BULMAN
SIDNEY M. GOLDSTEIN
ARTHUR S. FELD
JOHN E. KENNEHAN

820 Woodward Building
Washington 5, D. C.

Attorneys for Appellant

QUESTIONS PRESENTED

1. Where, in a suit for personal injuries resulting from a collision between two vehicles, there are multiple plaintiffs, one of whom is a passenger (appellant here) without ownership in either vehicle, and where there has been no defense or evidence of contributory negligence in regard to the passenger-appellant, and where the Court fails and refuses in its charge to the jury to explain that the law of contributory negligence does not bar the appellant passenger right to recover, in the opinion of appellant the following question is presented:

Did not the District Court commit prejudicial error in failing to instruct the jury that appellant-passenger's right to recover could not be barred by contributory negligence?

2. Where upon the poll of the jury in open Court, a juror clearly indicates his confusion with the jury finding, and the Court fails to resolve the confusion, and where said juror and other jurors file sworn statements that the verdict against appellant was due to confusion caused by the Court's instructions and where the District Court denied, without a hearing, appellant's motion for a new trial in the opinion of appellant, the following question is presented:

Did not the District Court err in denying appellant's motion for a new trial in light of the confusion presented in open Court when the jury was polled, and in light of the sworn statements that said confusion respecting the rights of appellant herein resulted from the Court's charge?

INDEX

TABLE OF CASES

TEXTS

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,721

DOROTHY HAYNES,

Appellant,

v.

HELEN COOLIDGE,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This is an appeal from the United States District Court for the District of Columbia. The jurisdiction of the District Court was based on 11 D.C. Code 306. The jurisdiction of this Court is conferred by 28 U.S.Code 1291.

STATEMENT OF THE CASE

Appellant-plaintiff, Dorothy Haynes, filed suit as co-plaintiff with plaintiffs, Dorothy M. Bones and Bernard L. King, against appellee for personal injuries sustained as the result of a motor vehicle collision occurring on February 27, 1960, in the District of Columbia. (J.A. 1) The said Bones and King are not parties to this appeal. Appellant was a passenger in the automobile operated by the said Bones and owned by the said King. (J.A. 1, 8)

Neither in defendant's answer (J.A. 4) nor pre-trial statement (J.A. 8) nor in the pre-trial order of the District Court (J.A. 8), is appellant's own negligence or contributory negligence alleged or indicated as a defense to appellant's cause of action. Nor in the course of the trial was any evidence produced establishing appellant's negligence or contributory negligence.

In its charge to the jury the District Court made no reference to appellant's passenger status nor distinguished her passenger status from that of a driver or owner. The charge explained how the law of contributory negligence would operate to bar the recovery of the plaintiff driver (Bones) and the plaintiff owner (King) but failed to explain or make clear that the law of contributory negligence would not bar the right of appellant (Haynes) a passenger, against whom there was no allegation or evidence of contributory negligence, to recover.

At the conclusion of the charge, counsel for appellant requested that the Court clarify appellant's passenger status and the operation of the law of contributory negligence with respect thereto. (J.A. 29-30) The Court declined to do so and noted appellant's objection. (J.A. 30)

A verdict was returned against the three plaintiffs, including this appellant, a passenger. (J.A. 33-34)

Counsel for appellant requested a poll of the jury. (J.A. 34-35) Upon the poll confusion was immediately evident in the replies of juror,

James S. Kiefer. (J.A. 34) Evidence of the said juror's confusion and the confusion of other jurors respecting appellant's right to recover, came to attention of appellant's counsel and jurors' sworn statements were filed in the District Court with appellant's motion for a new trial. (J.A. 39-40) The District Court denied appellant's motion without benefit of a hearing thereon. (J.A. 41)

A notice of appeal was timely filed.

STATEMENT OF POINTS

1. The verdict against appellant is contrary to law.

2. The Court erred in refusing to clarify its instruction on the law of contributory negligence as it affected appellant who was a passenger.

3. The Court erred in refusing to clarify its instruction on the passenger status of appellant.

4. The Court erred in refusing to amplify its instructions although acknowledging to counsel that the jury "will have some trouble about it."

5. The Court erred in failing to require further deliberation of the jury when confusion was apparent upon the poll.

6. The Court erred in denying appellant the opportunity of a hearing on her motion for a new trial and in failing to give any consideration to jurors' affidavits impeaching the verdict.

7. The Court charge led the jury into confusion insofar as its instructions related to appellant.

SUMMARY OF ARGUMENT

I

The District Court committed prejudicial error in failing to instruct the jury on appellant's passenger status and in failing to distinguish that status from that of plaintiff, Bones, the driver, and that of plaintiff, King, the owner. As a result of the aforesaid failure, the District Court neglected to explain that the law of contributory negligence was not applicable to appellant, a passenger. The Court's then failure to clearly exclude appellant, a passenger, from the reach of the doctrine of imputable negligence (as between driver and owner) resulted in jury confusion, and in an inadequate instruction on the law of the case, to appellant's prejudice.

The aforesaid failures were compounded when the District Court denied appellant counsel's request for an instruction explaining that the law of contributory negligence would not bar a recovery by appellant. The District Court's then denial of appellant's motion for a new trial without a hearing thereon, was, in the circumstances, prejudicial error.

II

Substantial justice to appellant, on the face of the record alone, namely,

> the transcript of the Court's charge, the colloquy between the Court and counsel following the charge, the dialogue between juror Kiefer and the Court upon the poll of the jury, and four juror affidavits,

warranted a new trial for appellant. The District Court's denial of appellant's motion for a new trial, without granting a hearing or the opportunity to file a reply to appellee's opposition constituted a clear abuse of discretion.

ARGUMENT

I

The District Court's Instruction to the Jury Was Wholly Inadequate in Failing to Distinguish Between Appellant's Passenger Status and That of the Other Plaintiffs and in Failing to Explain That the Law of Contributory Negligence Was Not Applicable to Her or a Bar to Her Recovery.

There can be no question that the purpose of a trial court's instruction is to furnish guidance to the jury in their deliberations and to thereby aid them in arriving at a proper verdict. The chief object of the court's charge is to explain the law of the case. It becomes, therefore, one of the most important duties of the court to expound the law to the jury. The trial judge, in his instructions, should inform the jury as to the law of the case that is applicable to the facts and in such a manner that the jury should not be misled. 53 Am. Jur. Trial § 509 (1945).

Appellant contends that the District Court failed to meet this standard in that it failed throughout the lengthy charge (1) to allude to appellant's passenger status (J.A. 13-29); (2) to define status and to explain the legal consequences flowing from different statuses as between a driver and passenger-owner on the one hand and a passenger who is no owner on the other (J.A. 13-29); (3) to explain the effect of the law of contributory negligence on appellant, a non-owning passenger, as distinguished from the other plaintiffs; and (4) to modify or amplify its instruction by denying appellant counsel's request for further instruction on the law of contributory negligence (J.A. 29-30).

Appellant contends that the question of her status as a passenger who had no ownership in either of the colliding vehicles was of the utmost importance. She well recognized that unless this status and its legal consequences were clearly understood by the jury she could be seriously prejudiced. Appellant had to rely upon the Court's instructions

of the law of contributory negligence to aid the jury in understanding that the law of contributory negligence would operate differently on each of the plaintiffs.

The controlling facts relative to status are as follows: the vehicle in which appellant was a passenger was owned by plaintiff King who was also a passenger in his own vehicle; plaintiff King's vehicle was driven by plaintiff Bones. (J.A. 1, 4, 8) Inasmuch as the right to recover damages is the essence of appellant's suit, it was as important for the Court to fully explain the status of the persons involved — whether driver, owner or passenger — in an automobile accident, as it is to explain the status of persons — whether invitee, licensee or trespasser — in a case of personal injury on the real property of another. As the right of a party to recover damages in the latter class of cases depends on status and its legal consequences, so too, does the right to recover damages depend on status in the former class of cases. Fifer v. United States, 93 U.S. App. D.C. 216, Baber v. Akers Motor Lines, 94 U.S. App. D.C. 211, Beck v. The Washington, Virginia and Maryland Coach Company, 95 U.S. App. D.C. 151.

The District Court instructed that if the jury found the plaintiff-driver (Bones) guilty of contributory negligence, it must also find the passenger-owner (King) guilty of contributory negligence. Certainly this was a correct statement of the law so far as it goes, but appellant contends that the instruction did not go far enough. The Court ignored the special status of appellant, also a passenger but not an owner, and with respect to whom the law of contributory negligence would not bar a recovery. On this fundamental proposition clearly delineating appellant's special status, the District Court was completely silent.

In confining the instruction on contributory negligence to Bones (the driver) and to King (the passenger-owner), the Court stated only one aspect of the law of contributory negligence. The Court stated its defensive character as to the claims of the plaintiff driver (Bones) and

the plaintiff-passenger and owner (King), but failed to state that the law of contributory negligence could not serve as a defense to the claim of another passenger who was not an owner, namely, appellant (Haynes). Clearly the instruction as it stood was an inadequate expression of the law of the case in so far as appellant was concerned.

Following the charge, appellant's counsel then addressed the Court in part as follows:

> "It has been made quite clear that if there is a finding against Miss Bones, then it precludes King from recovery. It is not quite so clear if the jury makes this finding against Miss Bones that it does not preclude Mrs. Haynes from recovering." (J.A. 30)

In part the Court replied:

> "I don't think I can make it any clearer. I am sure they will have some trouble about it but I have made it as clear as I can." (J.A. 30)

Obviously, it could have been made a great deal clearer and without difficulty and there was a positive duty to do so when the Court itself acknowledged that the jury would have trouble on the point. To illustrate how simply the District Court could have modified its instruction, appellant calls the attention of this Court to the following language from the charge:

> "To return for a moment to this matter of contributory negligence, you are instructed that because the plaintiff Miss Bones was driving an automobile owned by the plaintiff Mr. King with his permission, she was by law his agent while driving the car and, therefore, any negligence or contributory negligence on her part must be imputed to him if you find her guilty of contributory negligence." (J.A. 22)

A very simple modification as follows could have cured the Court's instruction of its defect:

> "To return for a moment to this matter of contributory negligence, you are instructed that because the plaintiff Miss Bones was driving an automobile owned by the plaintiff Mr. King with his permission, she was by law his agent while driving the car and, therefore, any negligence or contributory negligence on her part must be imputed to him if you find her guilty of contributory negligence. However, as to plaintiff Mrs. Haynes, who was a passenger, there can be no imputation of negligence if you find Bones guilty of contributory negligence. (Underlined words are the suggested amplification)

Appellant urges upon this Court that such language as suggested above, or language of like import, would have filled in the gaping hole in the Court's charge, and cured the charge of its defective character. That this could have been done very simply is too obvious to require further illustration or argument. The District Court's refusal to amplify its instruction as requested produced a confusion which is plainly in the record of the jury poll. (J.A. 28, 39, 40) The courageous juror, Mr. James G. Kiefer, Sr., frankly expressed his confusion in open Court. His earnestness was rewarded not only by aid or enlightenment, but only by the persistent question from the Court:

"Is this your verdict?" (J.A. 34-35)

Subsequently, the sworn statements of other jurors, which are part of appellant's record, confirmed the fact of widespread confusion on the law of contributory negligence as it affected appellant. (J.A. 39, 40).

The failure to give a proper requested instruction is a ground for a new trial. 6 Moore, Federal Practice 59.08(2) at 3778 (1962). Appellant, therefore, urges upon this Court that the District Court's instructions were inadequate and prejudicial to appellant, and that the District Court's denial of appellant's motion for a new trial constituted prejudicial error.

II

The District Court's Denial of Appellant's Motion for a New Trial, With a Record Before the Court of Flagrancy and Irregularity, Was Prejudicial Error and a Clear Abuse of Judicial Discretion.

Appellant, on December 28, 1962, timely filed a motion for a new trial and executed at the same time a motions card requesting an oral hearing on said motion. Appellant's motion was accompanied by a transcript of pertinent sections of the record to support the motion and by a number of sworn statements from jurors relative to the confusion resulting from the instructions. Appellee's opposition was docketed January 10, 1963, which was not timely, and the District Court issued its order January 14, 1963, allowing appellant no opportunity to reply.

Appellant contends that the District Court procedure on appellant's motion was, at the least, arbitrary, and at the worst, prejudicial, to appellant's substantial rights and an abuse of judicial discretion.

Appellant for the purpose of establishing before this Court the flagrancy and irregularity referred to in the caption of this argument, restates and incorporates in Argument II, all that she has stated in Argument I, above, relating to (1) the District Court's failure to instruct on or define appellant's status as a non-owning passenger; (2) the District Court's failure to instruct that the law of contributory negligence was no bar to appellant's right to recovery; (3) the District Court's failure to amplify its instruction upon request of appellant's counsel, although acknowledging that the point would cause the jury trouble; and (4) the District Court's failure to aid a juror when obviously confused at the time of the jury polling. Appellant earnestly contends that such a record entitled her to a full hearing and the opportunity to argue her motion for a new trial.

Appellant submits that the record before the District Court on appellant's motion for a new trial was not a record merely of jurors'

affidavits, but was such a record, as stated above, as to entitle appellant to a new trial even in the absence of the jurors' affidavits. Appellant's cause of action should not be permitted to pass into oblivion, unremedied, on the strength of the outworn and outmoded shibboleth that a "juror's testimony or affidavit is not receivable to impeach his own verdict."

Appellant urges upon this Court the view of the ancient formula taken by Professor Wigmore, who states:

> "But this rule of thumb is in itself neither strictly correct as a statement of the acknowledged law, nor at all defensible upon any principle in this unqualified form. It is a mere shibboleth, and has no intrinsic signification whatever." 8 Wigmore Evidence § 2345 at 633 (1950 ed).

It was upon this mere "shibboleth" that appellee's opposition to appellant's motion for a new trial was based. Appellant urges this Court to reject it.

Appellant maintains that the better view of the rule is that enunciated by Professor Wigmore and adopted by Justice Cardozo who in sanctioning an exception to the rule stated:

> "For the origin of the privilege we are referred to ancient usage, and for its defense to public policy. Freedom of debate might be stifled and independence of thought checked if jurors were made to feel that their arguments and ballots were to be freely published to the world. The force of these considerations is not to be gainsaid. But the recognition of a privilege does not mean that it is without conditions or exceptions. The social policy that will prevail in many situations may run foul in others of a different social policy, competing for supremacy. It is then the function of a court to mediate between them, assigning, so far as possible, a proper value to each, and summoning to its aid all the distinctions and analogies that are the tools of the judicial process." Clark v. U. S., 289 U.S. 1.

The Court's attention is also called to the collection of federal cases permitting exceptions to the inflexibility of the rule against impeachment, gathered by Professor Moore. See 6 Moore, Federal Practice § 59.08(4) at 3796 (1953).

It is appellant's position that the jurors' sworn statements were entitled to consideration. Assuming that the rule against impeachment was determinative of the action taken by the District Court, appellant contends that the record before the Court presented a situation that needed both airing and light. However, even in the absence of the jurors' affidavits, the record was one requiring a new trial to protect appellant's substantial rights.

CONCLUSION

For the foregoing reasons, appellant respectfully submits that she is entitled to a new trial.

Respectfully submitted,

JOSEPH D. BULMAN
SIDNEY M. GOLDSTEIN
ARTHUR S. FELD
JOHN E. KENNAHAN

820 Woodward Building
Washington 5, D. C.

Attorneys for Appellant

INDEX

JOINT APPENDIX

[Filed March 10, 1960]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DOROTHY M. BONES
3818 Beecher St., N. W.
Washington, D. C.

and

BERNARD L. KING
3527 Porter Street, N. W.
Washington, D. C.

and

DOROTHY L. HAYNES
3818 Beecher St., N. W.
Washington, D. C.,

Plaintiffs,

vs.

HELEN I. COOLIDGE
3005 O St., N. W.
Washington, D. C.,

Defendant.

Civil Action No. 712-60

COMPLAINT
(Personal Injuries)
(and Property Damage)

1. This Court has jurisdiction of the within cause of action the amount in controversy exceeding the sum of Three Thousand Dollars ($3,000.00).

2. On, to wit, February 27, 1960, plaintiff, Dorothy M. Bones was operating the vehicle owned by plaintiff, Bernard L. King, in a northerly direction on 29th St., N. W., at or near its intersection with M St., N.W., Washington, D. C. At the time and place aforesaid, defendant, Helen I. Coolidge, was operating her vehicle in an easterly direction on M St. in a careless and negligent manner and in violation of

the traffic rules and regulations then and there in effect in the District of Columbia. As a result of defendant's carelessness and negligence as aforesaid, defendant struck the vehicle operated by plaintiff, Dorothy M. Bones, causing said plaintiff to be thrown in and about the vehicle, and to sustain thereby severe personal injuries.

3. On, to wit, February 27, 1960, plaintiff, Dorothy M. Bones, was operating the vehicle of plaintiff Bernard L. King in a northerly direction on 29th St., N. W., at or near its intersection with M. St., N. W., Washington, D. C. Plaintiff Bernard L. King was a passenger in the said vehicle. At the time and place aforesaid, defendant, Helen I. Coolidge, was operating her vehicle in an easterly direction on M St. in a careless and negligent manner and in violation of the traffic rules and regulations then and there in effect in the District of Columbia. As a result of the defendant's carelessness and negligence as aforesaid, defendant struck the vehicle owned by plaintiff Bernard L. King, causing him to be thrown in and about said vehicle, and to sustain thereby severe personal injuries; said collision also resulted in extensive property damage to said plaintiff's vehicle.

4. On, to wit, February 27, 1960, plaintiff, Dorothy M. Bones was operating the vehicle owned by plaintiff, Bernard L. King, in a northerly direction on 29th St., N. W., at or near its intersection with M St., N. W., Washington, D. C. Plaintiff Dorothy L. Haynes was a passenger in said vehicle. At the time and place aforesaid, defendant, Helen I. Coolidge, was operating her vehicle in an easterly direction on M St. in a careless and negligent manner and in violation of the traffic rules and regulations then and there in effect in the District of Columbia. As a result of the defendant's carelessness and negligence as aforesaid, defendant struck the vehicle owned by plaintiff Bernard L. King, causing plaintiff Dorothy L. Haynes to be thrown in and about said vehicle, and to sustain thereby severe personal injuries.

5. As a result of the negligence of the defendant as aforesaid, plaintiff, Dorothy M. Bones, sustained severe, permanent and painful

injuries, in and about the head, body and limbs; mental anguish and nervous shock; has suffered, and will continue to suffer, great physical pain; has expended, and will continue to expend, great sums of money for hospital and medical care and associated items; and was rendered unable to pursue her usual gainful occupation and normal activities.

6. As a result of the negligence of the defendant as aforesaid, plaintiff, Bernard L. King, sustained severe, permanent and painful injuries, in and about the head, body and limbs; mental anguish and nervous shock; has suffered, and will continue to suffer, great physical pain; has expended, and will continue to expend, great sums of money for hospital and medical care and associated items; and was rendered unable to pursue his usual gainful occupation and normal activities; and sustained extensive property damage.

7. As a result of the negligence of the defendant as aforesaid, plaintiff, Dorothy L. Haynes, sustained severe, permanent and painful injuries, in and about the head, body and limbs; mental anguish and nervous shock; has suffered, and will continue to suffer, great physical pain; has expended, and will continue to expend, great sums of money for hospital and medical care and associated items; and was rendered unable to pursue his usual gainful occupation and normal activities.

WHEREFORE, the plaintiff, Dorothy M. Bones, demands judgment against the defendant, Helen I. Coolidge, in the sum of Seven Thousand Five Hundred Dollars ($7500.00), and

WHEREFORE, the plaintiff, Bernard L. King, demands judgment against the defendant, Helen I. Coolidge, in the sum of Three Thousand Five Hundred Dollars ($3500.00), and

WHEREFORE, the plaintiff, Dorothy L. Haynes, demands judgment against the defendant, Helen I. Coolidge, in the sum of Fifteen Thousand Dollars ($15,000.00), besides interest and costs.

/s/ Joseph D. Bulman
/s/ Arthur S. Feld
/s/ Sidney M. Goldstein
/s/ John E. Kennahan
Attorneys for Plaintiffs

* * *

The plaintiffs demand trial by jury.

/s/ John E. Kennahan

[Filed Oct. 14, 1960]

ANSWER TO COMPLAINT

First Defense

The defendant admits that on February 27, 1960 there was an accident within the intersection of 29th and M Streets, N. W., in the District of Columbia between an automobile being operated by the defendant and an automobile owned by the plaintiff Bernard L. King, being operated by the permissive agent of the plaintiff King, the plaintiff Dorothy M. Bones, in which the plaintiff Dorothy L. Haynes was riding as a passenger. Defendant has no knowledge nor information sufficient to form a belief as to the allegations of injuries and damages contained in the complaint. The remaining allegations of the complaint are denied.

Second Defense

The accident was caused or contributed to by negligence and violation of motor vehicle regulations in the operation of the automobile owned by the plaintiff Bernard L. King and being operated by his permissive agent, the plaintiff Dorothy M. Bones.

HOGAN & HARTSON

By /s/ Frank F. Roberson

* * *

Attorneys for Defendant

[Certificate of Service]

[Filed May 8, 1962]

PLAINTIFFS' PRETRIAL STATEMENT

OCCURRENCE:

On February 27, 1960, plaintiff, Dorothy M. Bones, was operating an automobile owned by the plaintiff, Bernard L. King, in a northerly direction on 29th Street, N.W., at or near its intersection with M Street,

N.W., Washington, D. C. At the same time and place, defendant, Helen I. Coolidge was operating her vehicle in an easterly direction on M Street, at or near its intersection with 29th Street, N. W., and collided with the vehicle operated by plaintiff, Dorothy M. Bones, in which plaintiffs Bernard L. King and Dorothy L. Haynes were passengers.

LIABILITY:

Failure to keep vehicle under control so as to avoid colliding. (Sec. 22a).
Failure to keep vehicle at that speed which was reasonable and prudent under the circumstances. (Sec. 22c).
Failure to yield right of way. (Sec. 46).
Disregard of stop sign and failure to come to a complete stop. (Sec.48).
Failure to warn by sounding the horn. (Sec. 54).
Failure to give full time and attention. (Sec. 99c).
Disregard of traffic control signal. (Sec. 11).
Failure to keep proper lookout and failure to exercise due care.
Failure to operate at reduced speed with respect to conditions existing.
Failure to slow at approach to intersection.
Reckless driving.

INJURIES:
(Dorothy Haynes)

Fracture of nasal bones, bridge swollen and tender.
Fracture of incisal edges of teeth with sensitivity to palpation and heat change.
Multiple contusions: forehead, both knees, left shoulder.
Sub-conjunctival hemorrhage, left.
Swellings: forehead, left eye swollen shut.
Post-traumatic headaches, dizziness, nervousness.
Pain and suffering; discoloration and hematoma formations.

Permanent:

Scar tissue; discoloration, tenderness over left supraorbital branch of 5th nerve.

SPECIALS:
(Dorothy Haynes)

Dr. Schuster	$ 85.00
Dr. Cox	25.00
Dr. Yuhaniak	17.00
Dr. Horwitz	105.00
Dr. Jacobson	190.00
George Washington University Hospital	334.00
Medication	10.10
Transportation	15.00
Loss of Earnings	185.00
	$ 966.10

INJURIES:
(Dorothy Bones)

Severely contused spleen.

Bruises, left knee and leg, ecchymosis.

Black right eye, ecchymosis.

Bruises of abdominal wall.

Permanent:

None.

SPECIALS:
(Dorothy Bones)

Dr. McCune	$ 20.00
Dr. James Feffer	43.00
Dr. MacDonald (x-rays)	15.00
Drs. Lindsay, Rice and Salinger	3.00
George Washington University Hospital	10.00
Transportation	10.00
Loss of Earnings	140.00
	$ 241.00

INJURIES:
(Bernard L. King)

Acute strain of cervical spine.

Multiple contusions and abrasions (right foreleg, left hand and forehead)

Sprain of left hand.

SPECIALS:
(Bernard L. King)

Dr. Jacobson	$ 25.00
Dr. Henry Feffer	70.00
George Washington University Hospital	5.50
Transportation	20.00
Loss of Earnings	36.64
Property Damage	50.00
	$ 207.14

STIPULATIONS:

Traffic Rules and Regulations of the District of Columbia.

Hospital reports and bills.

X-ray plates.

Amounts claimed on loss of earnings.

Exchange of witnesses.

Joseph D. Bulman

John E. Kennahan
Attorneys for Plaintiffs
* * *

[Certificate of Service]

[Filed May 8, 1962]

DEFENDANT'S PRETRIAL STATEMENT

Defendant admits that on February 27, 1960, a collision occurred at approximately 4:30 p.m. in the intersection of 29th and "M" Streets, N.W., between a vehicle owned and operated by her and a vehicle owned by the plaintiff Bernard King and operated by his permissive user Dorothy Bones. Defendant denies negligence and asserts the sole or contributory negligence of the operator, Dorothy Bones, which is attributable to the owner Bernard King so as to bar their claims in that the operator was proceeding at an unreasonable speed, failed to keep a proper lookout, failed to give full time and attention to the operation of Bernard King's vehicle, failed to look or look effectively to see what there was to be seen and failed to slow for an intersection. She also violated the following traffic regulations: §§ 22a, 22b, 22c, and 99c.

Requested Stipulations

1. Physical examination of Dorothy Haynes and any other plaintiff claiming permanent injury.

2. Income tax returnes of Dorothy Haynes for 1959, 1960, and 1961.

3. Exchange of medical reports.

4. Exchange of witnesses.

HOGAN & HARTSON

By David N. Webster
Attorneys for Defendant
* * *

[Certificate of Service]

[Filed May 10, 1962]

PRETRIAL PROCEEDINGS

Tort for personal injuries.

THE PARTIES AGREE TO THE FOLLOWING STATEMENT OF FACTS AND STIPULATE THERETO:

On Feb. 27, 1960, at approximately 4:30 P.M., the P, Dorothy M.

Bones, then age 20, was operating an automobile owned by P Bernard L. King, then age 24, in a northerly direction on 29th St., N.W., Washington, D. C. At the same time the D was operating her vehicle east on M Street. The vehicles collided at the intersection of the 2 streets. P King and the P, Dorothy L. Haynes, then age 42, were in the vehicle operated by Bones. The intersection in question was controlled by traffic signals which were operating at the time. Roads dry, weather clear.

PLAINTIFFS claim that the D's vehicle ran thru a red traffic signal and that the accident, their injuries and damages were caused by the negligence of and violations of D. C. Traffic Regulations by the D and her reckless driving as follows: failure to keep vehicle under control so as to avoid colliding, Sec. 22a; failure to keep vehicle at that speed which was reasonable and prudent under the circumstances, Sec. 22c; failure to yield the right of way, Sec. 46; disregard of stop sign and failure to come to a complete stop, Sec. 48; failure to give full time and attention, Sec. 99c; disregard of traffic control signal, Sec. 11; failure to keep proper lookout; failure to operate at reduced speed with respect to conditions existing; failure to slow at approach to intersection.

DEFENDANT denies negligence and denies violations of D. C. Traffic Regulations; asserts the sole or contributory negligence of the operator, Dorothy Bones, which is attributable to the owner, Bernard King, who was a passenger in the car barrs their claims in that the operator was proceeding at an unreasonable speed, failed to keep a proper lookout; failed to give full time and attention to the operation of King's vehicle; failed to look or look effectively to see what was there to be seen and failed to slow for an intersection. She also violated the following DC Traffic Regulations, Secs, 22a, b, c, and Sec. 99c.

INJURIES:

Dorothy Haynes - fracture of nasal bones, bridge swollen and tender. Fracture of incisal edges of teeth with sensitivity to palpation and heat change. Multiple contusions: forehead, both knees, left shoulder. Sub-conjunctival hemorrhage, left. Swellings: forehead, left eye swollen shut. Post-traumatic headaches, dizziness, nervousness. Pain and suffering; discoloration and hematoma formations.

Permanent: Scar tissue; discoloration, tenderness over left supraorbital branch of 5th nerve.

SPECIALS: Dorothy Haynes

Dr. Schuster, $85.00; Dr. Cox, $25.00; Dr. Yuhaniak, $17.00; Dr. Horwitz, $105.00; Dr. Jacobson, $190.00; George Washington University Hospital, $334.00; Medication, $10.10; transportation, $15.00; loss of earnings, $185.00. Total, $966.10.

INJURIES:

Dorothy Bones - severely contused spleen; bruises, left knee and leg, ecchymosis. Black right eye, ecchymosis. Bruises of abdominal wall.

Permanent - None.

SPECIALS - Dorothy Bones

Dr. McCune, $20.00; Dr. James Feffer, $43.00; Dr. MacDonald (x-rays), $15.00; Drs. Lindsay, Rice and Salinger, $3.00; George Washington University Hospital, $10.00; transportation, $10.00; loss of earnings, $140.00. Total, $241.00

INJURIES:

Bernard L. King - Acute strain of cervical spine. Multiple contusions and abrasions (right foreleg, left hand and forehead). Sprain of left hand. No permanent injury.

SPECIALS - Bernard L. King

Dr. Jacobson, $25.00; Dr. Henry Feffer, $70.00; George Washington University Hospital, $5.50; transportation, $20.00; loss of earnings, $36.64; Property damage, $50.00. Total $207.14.

NOTE: Plaintiffs' counsel asserts permanent injuries to P Haynes. One medical report in his possession seems to indicate a scar on her face but with reference to this, and the other allegations of permanent injury, P at the time of pretrial, had no unequivocal written medical statement to sustain these claims.

STIPULATIONS

The following may be admitted in evidence without formal proof, subject to all proper legal objections: DC Traffic Regulations listed herein; x-ray plates; hospital records; hospital bills, initialled by Examiner; physician and dentist bills, initialled by Examiner; photographs, initialled by Examiner.

The parties agree to the mutual exchange of all medical reports of examining or treating physicians, now in hand, on or before May 28, 1962, and a similar exchange of all other such reports within 48 hours of the alert of this case for trial.

Counsel for Ps agrees to make the P, Dorothy Haynes, available for the purpose of a physical examination by physician of D's choice before, but not to interfere with, trial.

The parties agree to file with the Clerk of the Court and to the mutual exchange of, on or before May 28, 1962, a list of the name(s) and address(es) of witnesses to the accident, to the circumstances surrounding same, and with reference to the nature and extent of injuries and damage.

P has other bills marked P-1 thru P-3 and photograph marked P-4, which he requests be admitted in evidence but D refuses to make any agreement with reference thereto.

Counsel for the Ps shall furnish to counsel for D a written authorization which will be supplied by D within 5 days, and returned to D on or before May 28, 1962, which will enable D to obtain copies of the Federal income tax return for the years 1959, 1960, 1961.

TRIAL COUNSEL: John E. Kennahan, Esq. for the Plaintiffs; Francis L. Casey, Jr., Esq. for the Defendant.

The Examiner has requested counsel for D to appear at trial with the maximum amount of authority to settle this case which will be allowed him by his principal.

Counsel for the Ps desires to take the deposition of the D, who has been out of the country. This may be done provided there is no delay in the trial caused thereby.

P requests D to stipulate to the loss of earnings claimed by each P but D refuses.

/s/ John E. Kennahan
Counsel for Plaintiffs

/s/ David N. Webster
Counsel for Defendant

/s/ John J. Finn
PRETRIAL EXAMINER

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS

1 Washington, D.C.
Wednesday, Dec. 19, 1962

The above-entitled matter came on for further trial before the HONORABLE EDWARD A. TAMM, Judge, United States District Court for the District of Columbia, and a jury at 10:00 a.m.

* * * * *

2 CHARGE TO THE JURY

THE COURT: Ladies and gentlemen of the jury, we have reached the point in the trial of this case when it becomes the Court's responsibility to instruct you as to the law that will govern you in reaching your verdict in this case and it is, of course, your responsibility to accept the law as it is outlined to you by the Court.

As you know, under our system of jurisprudence, we actually have two judges or groups of judges in the courtroom. The Court is required to pass upon and rule upon and make findings on the questions of law, and the jury is required to make findings on all questions of fact.

In our beautiful courthouse, we are the frequent recipients of visitors from foreign countries who come to study our judicial system. Except for the people who come from the English speaking countries, we observe that the jurists and the lawyers from the rest of the world are never able to understand the function of a jury in either a civil or criminal case. We have great difficulty in explaining to them just how the jury operates and what their function is and, ultimately, we get down to the illustration that I have just given you, that the jury is the judge of the facts.

3 This, then, defines your responsibility in this trial. It is for you to determine, within the framework of the Court's instructions, what facts have been established by the evidence and then to apply the law as the Court defines it to you to those facts.

The same high standard of objectivity is expected of you as

jurors that is expected of the Court. In other words, you will weigh the evidence which has been presented here without bias, without prejudice or without favor towards one side or the other.

I repeat, you are the exclusive judges of the facts. In this regard I caution you that the closing arguments made by these attorneys yesterday afternoon do not constitute evidence in the case. Obviously, the closing statements are efforts on the part of these advocates to present their version of the evidence in the light that is most favorable to the client that they represent. Remember, then, that the attorneys' recollections of the evidence are not binding upon you nor is the Court's recollection of the evidence, if I have any occasion to refer to any of the evidence, binding upon you because it is your recollection of the evidence which must govern you in reaching your verdict in the case.

4 As jurors you are the sole judges of the credibility of the witnesses. This means, of course, that you must determine in this case which of these witnesses you are going to believe and to what extent you are going to believe them.

In passing upon the credibility of the witnesses, you have the right to consider the demeanor of each witness on the witness stand, his or her manner of testifying. You may consider whether the witness impresses you as having an accurate memory and recollection of the facts about which the witness is testifying. You may consider whether the witness displays any apparent favor or prejudice towards one side or the other and, of course, you must also consider whether the witness has any interest in the outcome of the case.

In a case of this kind, I think the principal problem for a jury is to pass upon the credibility of the witnesses. It is I think your major problem in this case in your discussions in the jury room to determine who is telling the truth and I think after that, the rest of your functioning should be relatively easy. This matter, then, of the credibility of the witnesses is entirely within your hands.

You have a right to draw upon all of the past experiences of your own
5 lives, upon all of the accumulated wisdom that you have acquired in dealing with people from day to day, and to apply to the testimony of each of these witnesses those standards which you have found reliable in making your day-to-day determinations as to whether people are telling the truth or are telling a falsehood.

If you believe that any witness willfully testified falsely as to any material fact concerning which that witness could not possibly be mistaken, you are then at liberty if you deem it desirable to do so to disregard the entire testimony of that witness or any part of the testimony of that witness.

I repeat, I think your major problem, your first determination must be to evaluate the credibility of these witnesses. In this respect, I have always complete confidence in the ability of the jury to determine who is telling the whole truth and who is shading the truth. I don't think that a witness has ever taken the stand in my courtroom that could fool twelve jurors. Consequently, I have the utmost confidence in your ability collectively to determine who is telling the truth in a case of this kind because I think the truth is so obvious that it is readily recognized by jurors.

In the course of this trial, the Court has had occasion to reject certain evidence. The Court has had occasion to sustain objections to
6 some evidence. You will not consider as evidence anything which the Court has rejected. Whenever the Court sustains an objection to a question, that eliminates that question from your consideration.

Your duty, then, becomes to resolve the conflicts of evidence in this case.

The burden of proof is upon these plaintiffs to sustain their aspects of the case by what we call a fair preponderance of the evidence. What does this mean?

The term "preponderance of the evidence" means such evidence as when weighed with that opposed to it, has the more convincing force.

If any of you have participated in criminal trials this month, you have heard the Judge tell you that the burden of proof is upon the Government to prove the defendant guilty beyond a reasonable doubt. This means that in criminal cases, the Government has a very heavy burden to prove guilt beyond a reasonable doubt. In civil cases, that is, cases where private parties are in litigation with each other, the burden of proof is not as heavy as in criminal cases. The burden of proof is upon the plaintiffs to sustain their aspects of the case by a fair preponderance of the evidence.

In the hope that no other Judge this month has illustrated this term rather than defined it to you, I am going to try by illustration to explain

7 the significance of this term "preponderance of the evidence":

Imagine, if you will, when you go into the jury room that you have on that handsome walnut table an apothecary scale. An apothecary scale is a scale in which two trays are suspended from a bar. The trays hang in equal balance. In the jury room label the right-hand tray the plaintiffs' tray, label the left-hand tray the defendant's tray. Place in the right-hand tray all of the evidence in the case that favors the plaintiffs' side of the case and give to that evidence the weight that you believe it should receive. Place in the left-hand tray, the defendant's tray, all of the evidence that favors the defendant's side of the case, again giving the evidence the weight that it should receive in your opinion.

If the right-hand tray goes down, that is, if the plaintiffs' evidence outweighs the defendant's evidence, then your verdict should be for the plaintiffs because the plaintiffs' evidence outweighs the defendant's evidence. On the other hand, if the left-hand tray goes down, if the defendant's evidence outweighs the plaintiffs' evidence, then your verdict should be for the defendant. If, however, the third possibility occurs, that is, if with all of the evidence in the case divided between the trays, the trays remain in equal balance, then your verdict must

8 be for the defendant because the plaintiffs have not proved their

case by a preponderance of the evidence.

A party has succeeded in carrying the burden of proof on an issue of fact if the evidence favoring his or her side of the question is more convincing than that tending to support the contrary side and if it causes you, the jurors, to believe that on that issue the probability of truth favors that party.

The burden of proof, then, is upon these plaintiffs to prove by a preponderance of the evidence that the defendant was negligent and that such negligence was the proximate cause of the injury to the plaintiffs.

The law does not permit you to guess or speculate as to the cause of this accident. You must base your findings solely upon the evidence that has been adduced before you and upon any inferences reasonably deductible therefrom. If the evidence is equally balanced on the issue of negligence or proximate cause so that it does not preponderate in favor of the party making the charge in the basic case, that is, the plaintiffs, of course then the plaintiffs have failed to fulfill their burden of proof.

I have several times in the course of these instructions to you used the word "negligence." Naturally, the question comes to mind,

9 What is negligence?

Negligence is the doing of some act which a reasonably prudent person would not do or the failure to do something which a reasonably prudent person would do, actuated by those considerations which ordinarily regulate the conduct of human affairs. Negligence is the failure to use ordinary care in the management of one's property or of one's person.

This term "negligence", however, is a relative term; it is never an absolute one. In other words, the question of negligence must be considered in the light of all of the circumstances in the individual case. What is negligence under one set of conditions might not be negligence under another set of conditions.

The standard of conduct, the standard of behavior, that the law requires of all of us is the standard of the man of ordinary prudence. None of us are expected or required to conduct ourselves according to the standard of an extraordinarily conscientious or a very intelligent person but rather the law extracts and requires from us the conduct which I have defined to you, the standard of conduct of a man of ordinary prudence under the same or similar circumstances.

I have used the phrase "proximate cause" in the course of these
10 instructions to you. What do these words mean? The proximate cause of an injury is that cause which in actual and continuous sequence unbroken by any efficient intervening cause produces the injury, and without which the result would not have occurred. The proximate cause of an injury is the efficient cause, the one that necessarily sets in operation the factors that cause the injury.

Both negligence and proximate cause, as I have defined them to you, are requisites for finding liability. The mere fact that an accident happened, considered alone and by itself, does not support an inference that some party or any party to the accident was negligent. No presumption of negligence whatever arises from the mere happening of an accident. On the contrary, the legal presumption is that legal care was exercised by all parties to the accident. The burden of proof is upon the plaintiffs to overcome this presumption of due care on the part of the defendant and to prove by a preponderance of the evidence that the defendant was negligent and that such negligence was the proximate cause of the accident.

There is in this case, in addition to the charge of negligence made by these plaintiffs against the defendant, a counter-charge in which the defendant charges the plaintiff driver of the car with contributory negligence. What, then, is the definition of contributory negligence?

11 Contributory negligence is negligence on the part of the person complaining, that is, the plaintiffs or a plaintiff, which combining in some degree with the negligence of another helps in proximately causing the injury of which the plaintiff complains.

If you find that the plaintiff Dorothy M. Bones was guilty of contributory negligence, you should find for the defendant as between Dorothy M. Bones and the defendant and also for the defendant as to the plaintiff Bernard L. King for reasons which I will explain to you in a few minutes, because one who is guilty of contributory negligence may not recover from another for the injuries sustained.

To repeat this point, a person who is guilty of contributory negligence, that is, a person whose negligence contributes in any degree to the causing of an accident, may not recover from any other person who was negligent in that accident. This is the doctrine of contributory negligence recognized as the law in this jurisdiction.

We have another doctrine in some of the states of our Union which is defined as the doctrine of comparative negligence. Under this doctrine, the jury is required to compare the degree of negligence of several persons involved in an accident in which two or more were negligent to determine the degree of negligence on the part of each of

12 the parties and to award a verdict for a percentage of the injury to the person who was the least negligent in the accident. I do not know how a jury without the aid of a computer, a very large electric computer, can resolve the evidence into these mathematical formulae that are required under the doctrine of comparative negligence. Probably that is the basic reason that we do not recognize that doctrine in this jurisdiction. We adhere to the doctrine of contributory negligence which I have defined to you.

The burden of proof to prove contributory negligence is, of course, upon the defendant under the requirements for burden of proof that I have previously outlined to you.

You are instructed that you may not guess or speculate as to the existence of any fact in this case. You must base your findings, as I have said, solely upon the evidence that has been adduced before you and upon any inferences reasonably deducible therefrom.

In determining whether negligence or contributory negligence and

proximate cause have been proved by a preponderance of the evidence, you should consider all of the evidence bearing upon the question regardless of which side produced the evidence. In other words,

13 evidence in the case is evidence for and against all of the parties to the case. A party is entitled to the same benefit from the evidence that favors him when produced by his adversary as when produced by himself.

With regard to the testimony of the witnesses, I must point out to you again that you evaluate the testimony without bias, favor or prejudice towards one side or the other. You must weigh the evidence in the case. In other words, you cannot arrive at a verdict in this or any other case by counting the number of witnesses on each side and awarding your verdict to the side that produces the most witnesses. If the Court permitted this procedure, I am sure that you can recognize that the ingenuity of attorneys would fill our witness rooms with such a number of witnesses that the Court would spend most of his life trying the same case. You don't count the witnesses, rather you weigh the testimony of the witnesses.

You are instructed that the testimony of one witness entitled to full credit is sufficient for the proof of any fact and may justify a verdict even if a number of witnesses have testified to the contrary if upon the whole case and considering the credibility of the witnesses, as I have defined that term to you, you should determine that the prob-

14 ability of truth favors the testimony of that one witness.

The Court has admitted into evidence several traffic regulations which have been read to you by the attorneys, either as evidence in presenting their case or as a part of their closing arguments. You are instructed that a violation of any traffic regulation constitutes negligence as a matter of law. Violation of a traffic regulation, even though it constitutes negligence as a matter of law, is only of significance in a case if the violation was a proximate cause of the injury of which the complaint is made.

Every person using a public highway must exercise ordinary care at all times to avoid colliding with other persons who are also using the highway and to avoid placing himself or others in danger; and while he may assume that others will exercise due care and obey the law, he may not for that reason fail to exercise ordinary caution on his own part.

You are further instructed that with respect to the issue of negligence of a party failing to yield the right-of-way, such right-of-way is not absolute and you must take into consideration not only the question of who had the technical right-of-way but also the distance of the various vehicles from the intersection, their respective speeds and other prevailing traffic conditions.

You are further instructed that the fact that one party has the technical right-of-way does not excuse him or her from the exercise of ordinary care to avoid injuring others.

You are instructed that when a person is using or is about to use a street or a highway, either as a pedestrian or as an operator of a motor vehicle, he has a duty to make reasonable observations as to traffic and other conditions which confront him in order to protect himself and others while using the roadway. What observations he should make and what he should do for his own safety are matters which the law does not attempt to regulate in detail except that it does place upon every person the continuing duty to exercise ordinary care to avoid an accident.

The fact that one who has a duty to look testifies that he or she did look but did not see that which was plainly there to be seen is of no legal significance, for one who looks ineffectually is as careless as one who does not look at all and such conduct on his or her part constitutes negligence.

The law requires the operator of a motor vehicle to keep a proper lookout in order that he may avail himself of what the lookout discloses in order to prevent injury to himself or others, which requirement

imposed by law is to look effectively. One who looks and does not see that which is plainly there to be seen is, I repeat, as negligent as one who does not look at all.

To return for a moment to this matter of contributory negligence, you are instructed that because the plaintiff Miss Bones was driving an automobile owned by the plaintiff Mr. King with his permission, she was by law his agent while driving the car and, therefore, any negligence or contributory negligence on her part must be imputed to him if you find her guilty of contributory negligence. For that reason, you must find for the defendant against the plaintiffs Bones and King in the event that you find that any negligence on the part of Miss Bones was one of the proximate causes of the collision.

This is a general statement of the law of agency insofar as it applies to the operation of automobiles in the District of Columbia. We have a statute which says very concisely and very explicitly that anyone who operates an automobile with the permission of the owner is for legal purposes the agent of the owner and, consequently, the neg-
17 ligence of the driver of the automobile may be charged and is charged by law to the owner of the automobile.

We come now to the question of the measure of damages in this case. If under the Court's instructions you find that the plaintiffs are entitled to a verdict, you will consider in fixing the amount of your verdict for each plaintiff the elements of damage which I will now enumerate to you:

First, the reasonable value not exceeding the cost to each plaintiff of the examinations, tests, attention and care by physicians and surgeons reasonably required and actually given in the treatment of these plaintiffs. You will also award such sums not exceeding the cost to the plaintiffs of the hospital accommodations and care, the ambulance service reasonably required and actually given in the treatment of these plaintiffs. In addition if under the Court's instructions you find the plaintiffs are entitled to a verdict, you will in addition award to each

of them that you find suffering from these elements such sum as will reasonably compensate them for the pain, discomfort and mental anguish suffered by them which under the evidence was shown to have been suffered by them as a proximate result of the injury in question.

18 In the case of the plaintiff Dorothy L. Haynes, you may in addition consider any future discomfort, mental anguish or pain which you find established by the evidence as being in the nature of a permanent injury in this case.

In addition, you will award to these plaintiffs if you find in their behalf the reasonable value of the time lost by them because of their injury wherein they were unable to pursue their usual occupation. In determining this amount, you should consider the evidence of the plaintiffs' individual earning capacity, the rate of pay, and determine what they were reasonably certain to have earned in the time lost had they not been disabled.

In his closing argument yesterday, Mr. Casey referred to the fact that the plaintiff Dorothy M. Bones was on sick leave and indicated that there was some compensation for her being on sick leave. This is not a factor which influences the question of damages in a civil case. The fact that a person is on compensation from any source while he is absent from his employment because of an injury is not a factor in mitigation of damages. The law says that if a defendant by negligence causes an accident and the plaintiff's employer is generous enough to provide compensation while the person is off from work, the defendant is not entitled to any bonus for that type of compensation. Consequently,

19 the fact that compensation is paid during sick leave is not a factor in mitigation of damages in a case of this kind.

In addition with reference to the plaintiff Dorothy L. Haynes, you will consider if you find in favor of this plaintiff such sum as will reasonably compensate her for any loss of earning power occasioned by the injury in question from which you find under the evidence she is reasonably certain to suffer.

With reference to the plaintiff Bernard L. King, you will if you find in his behalf award him such sum as will reasonably compensate him for the damage to his property, that is, the damage done to his automobile as a result of this accident.

You are instructed that the plaintiffs bear the burden of proof on all damage and injury issues in this case. This means that in order for you to compensate any of them for an injury, you must find that they have established by a fair preponderance of the evidence that they suffered the injury for which they claim compensation and that the injury was proximately caused by the accident. If you find that the evidence supports only the conclusion that the injury was possibly suffered or that it was only possibly the result of the accident, you
20 cannot award compensation for the claim of injury. This is so because the plaintiffs' burden of proof on such issue requires that they establish that the injury was probably the result of the accident.

For this reason, the testimony of a physician that a plaintiff may possibly have suffered an injury fails to satisfy the plaintiff's burden of proof on the issue of that injury. In order for a physician's testimony to satisfy the burden of proof on the issue of that injury, he must at least testify that as a matter of reasonable medical probability the injury was suffered by that plaintiff.

If you find for these plaintiffs or any of these plaintiffs, the amount of your verdict is left to your sound discretion but your award must be just and reasonable and must be based upon the evidence introduced.

Your verdict in this case, of course, must be a unanimous one which means that all twelve of you must concur in your verdict.

I have instructed you on the subject of the measure of damages in this case because it is my duty to instruct you as to all the law that may become pertinent in your deliberations. I, of course, do not know whether you will need the instructions on damages and the fact that I have given them to you must not be considered as intimating any
21 view of my own on the issue of liability or as to which party is entitled to your verdict.

In the course of instructions of this kind to the jury, it is unavoidable that certain points are repeated. If in the course of these instructions, then, any rule, direction or idea has been stated by me in varying ways, no emphasis thereon is intended by me and none must be inferred by you. For that reason, you should not single out any certain sentence or any individual point or instruction and ignore the others, but you are to consider all of the instructions as a whole and to regard each in the light of all of the others.

The Court has admitted in evidence a number of papers and photographs. Anything which has been admitted in evidence is available for your examination in the jury room if you desire to see it. If, consequently, you want to see any of these exhibits, you have but to request the marshal who is in attendance at the jury room door for the exhibits and they will be sent in to you.

This has been a relatively short trial; the objections have been minimal; the Court's rulings on objections and evidence have been relatively few. I tell you this to caution you that you should not attempt to interpret any of the Court's rulings as to legal questions involving
22 evidence or the presentation of the case as indicating that the Court favors one side or the other in the case.

I have been told by friends who have served on juries in the past that occasionally a juror with a mathematical bent, or possibly a sports fan, has kept a box score of the Court's rulings for or against one side or the other in the case and has announced in the jury room that the judge thinks the verdict should be in favor of this party because he ruled twelve times in favor of one party and only six times in favor of the other. Obviously, in ruling upon objections to evidence and questions and upon other legal matters, the Court does so to the best of the Court's ability in accord with the rules that prevail regulating the conduct of trials. In doing so the Court has no intention, desire or inclination to indicate any favor towards one side or the other.

I express this word of caution in order to emphasize the fact that

I have not expressed nor intended to express, nor have I intimated or intended to intimate any opinion of my own as to what witnesses are or are not worthy of belief, what facts have or have not been established by the evidence, or what inferences should be drawn from the evidence. The Court endeavors religiously to avoid indicating any favor

23 or prejudice towards one side or the other in any case. This Court endeavors in its charge to the jury to refrain from any specific reference to items of evidence or as to any individual witnesses upon the witness stand.

As you may or may not know, we Judges of the Federal Courts have the right in our closing instructions to the jury to tell the jury our own impressions of the case. I have the right, if I see fit to exercise it, to tell you which witnesses I believe, which witnesses if any I don't believe and why I don't believe them. I have the right to tell you what facts I believe the evidence has established or what facts have not been established. I have the right to comment upon the entire case from the Court's viewpoint, subject only to the magic qualification that in expressing my views I say to you, "Of course, you must not be influenced by what I say about the case." I have said to other juries in the past that I have never been able to understand why a Judge would take the jury's time to tell them his own impressions of the case if he didn't at least hope that in spite of what he said, they would be influenced by what he said about the case.

But in this case, I repeat, the Court has not intended by any inference to indicate any views as to which party should prevail in the lawsuit.

24 I want to speak just a word of caution about the conduct of jurors upon entering the jury room. It is most unwise for a juror immediately upon entering the jury room to announce in a loud clear voice that he or she will stand for only one verdict in the case. If a juror takes that position at the very outset of deliberations in a case, his or her pride may cause him reluctantly to maintain that position even though

the discussion in the jury room may convince him that he was mistaken when he took that position.

Each of you must decide this case in accord with the dictates of your own conscience. Your verdict must be one that you can justify to yourselves for the rest of your lives. I believe that for all of you people, this is the last case in which you will participate this month. Undoubtedly, for some of you, it is the last case in which you will participate as jurors in the course of your lifetime. I am sure that this case will remain in your memories for a long time. Your verdict, in the final analysis, must be one that you can justify to your own conscience tomorrow and a year from now.

With this in mind, you should enter the jury room with the desire to listen to the arguments of your fellow jurors with a willingness to be convinced. If some point in the evidence has made no impression whatsoever upon you and yet has made a weighty impression upon other jurors, you should consider that point of evidence very carefully and ask yourself, "Why didn't this point impress me when it impressed all of these other jurors who are equally intelligent and equally honest with myself?" You should not vote upon any question put to you by your foreman in a particular way merely because a majority of the other jurors are voting that way. You must make up your own mind as to the factual situation in the case. You should try to reach a unanimous verdict in the case but, individually, you should do so only if you can justify your position to your own conscience.

To each of you, I say you must make up your own mind as to your verdict in the case but you should not do so until you have listened with a willingness to be convinced to the arguments advocated by other jurors in the jury room.

The Court has spent 45 minutes in defining various terms of law, various requirements of the law in an effort to assist you in reaching a verdict in this case. As a practical matter, how can you go about applying this 45-minute instruction to the facts in this case? I would

suggest that, under your foreman's direction, you carry out a series of questions to yourselves somewhat like the following outline:

Ask yourselves first: Was the defendant negligent? If your answer to this question is no, you find for the defendant and that is the end of

26 your responsibility. If however you answer this question yes, the defendant was negligent, then you ask yourselves a second question: Was the defendant's negligence the proximate cause of the injury to the plaintiffs? If your answer to this question is no, then your verdict is for the defendant. If your answer to this question is yes, then you go to the third question: Was the plaintiff Dorothy M. Bones guilty of contributory negligence? If your answer to this question is yes, then you find for the defendant against the plaintiffs Bones and King and go to the question of damages as to the plaintiff Haynes. If your answer to this question is no, that is, the plaintiff Dorothy M. Bones was not guilty of contributory negligence, then you go to the question of damages as to all of the plaintiffs.

In this case, for the purposes of your verdict, you have actually three cases. We have three plaintiffs, each suing one defendant.

When you return to the courtroom, the procedure will be substantially as follows: The Clerk will address your foreman and say, Mr. Foreman or Madam Foreman, in the case of Dorothy M. Bones, do you find for the plaintiff Bones or for the defendant Coolidge? If your foreman answers, For the defendant Coolidge, that finishes that plaintiff. If your foreman answers, For the plaintiff, the Clerk

27 will then say, In what amount? And your foreman will announce the amount of your verdict for the plaintiff Bones.

The Clerk then asks your foreman, In the case of Bernard L. King, do you find for the plaintiff King or for the defendant Coolidge? If you find for the defendant Coolidge, that ends that inquiry. If your foreman says, We find for the plaintiff King, the Clerk asks, In what amount?

The Clerk will then ask, In the case of the plaintiff Haynes against

the defendant Coolidge, do you find for the plaintiff or for the defendant? If your answer is for the plaintiff, the Clerk again asks, In what amount?

In other words, you will return a separate verdict with reference to each of the three plaintiffs as against the defendant.

The amount of your verdict, I repeat, is left to your sound discretion. If you find in favor of any plaintiff, your verdict is in a single sum, that is, a single amount. You do not allocate a certain amount for medical bills, a certain amount for pain and suffering, or a certain amount for property damage in the case of the plaintiff King but rather your verdict, if you find for any plaintiff, is in one single amount.

Will counsel approach the Bench.

28 (At the Bench)

THE COURT: I will assume for the record that counsel for both the plaintiffs and the defendant renew any objections offered to prayers previously requested by opposing counsel and granted by the Court; and that counsel at this time again request any prayers previously requested and denied by the Court, and renew any objections made thereto.

Does the plaintiff request any further charge?

MR. KENNAHAN: Yes, Your Honor. Yesterday when we were discussing instructions on the matter of damages, I requested that the amount of the ad damnum clause be read into the Court's charge, that I accepted the standard instruction on damages subject to that reservation indicating to the jury merely that that was the upper limit. My recollection of the proceeding yesterday is that Mr. Casey opposed this charge but the Court granted it.

THE COURT: The Court denied it.

MR. KENNAHAN: The Court denied it?

THE COURT: Period.

The Court has renewed your objection to the Court's action on the record.

Do you request any further charge?

MR. KENNAHAN: The only item that I think probably is not clear is this: It has been made quite clear that if there is a finding against
29 Miss Bones, then it precludes King from recovery. It is not quite so clear if the jury makes this finding against Miss Bones that it does not preclude Mrs. Haynes from recovering.

THE COURT: The Court confined its instruction on the matter of contributory negligence to Dorothy M. Bones and Bernard L. King. In outlining the questions that the jury should ask themselves, I pointed out they should determine first negligence, then proximate cause, then contributory negligence. The Court said affirmatively if they find contributory negligence on the part of Dorothy M. Bones, they should find for the defendant as against Dorothy M. Bones and Bernard L. King, and proceed to the question of damages with reference to the plaintiff Haynes.

I don't think I can make it any clearer. I am sure they will have some trouble about it but I have made it as clear as I can.

Do you have any other objections to the charge other than those already made and renewed for the record?

MR. KENNAHAN: No, Your Honor.

THE COURT: Mr. Casey, do you request any further charge?

MR. CASEY: Pursuant to Ridilia versus Kerns, 155 Atlantic 2d at 517, a 1959 case, in which our United States Court of Appeals granted
30 leave to appeal from a Municipal Court of Appeals decision and sua sponte approved that leave, therefore approving of the authority, I ask Your Honor since you have told the jury that the fact that Mrs. Haynes received sick leave benefits while she was absent and that that fact does not preclude her from recovering for lost earnings, that you tell the jury that they may consider the fact that she received sick leave in determining whether or not the absence was reasonably necessary as a result of the injury.

I also ask Your Honor to correct the instruction as given. I didn't refer to Mrs. Haynes, who is self-employed, in my argument on

that point but to the other two plaintiffs, one who is a government employee and the other who is a Washington Gas Light employee, both of whom received sick leave from their employers.

THE COURT: The Court will deny your request for further instruction.

MR. CASEY: That is the only additional request I have, Your Honor.

THE COURT: Do you have any objection to the charge as given?

MR. CASEY: I object to the charge I just referred to wherein Your Honor stated that I argued Mrs. Haynes had received sick leave and the instruction that she was entitled to recover for that absence
31 even though she had received sick leave benefits.

THE COURT: I do not believe I said Haynes; I referred to the plaintiff Bones in that connection.

Madam Reporter, will you look back in my charge and read that portion of it to me, please.

(An excerpt of the charge to the jury was read by the reporter.)

MR. CASEY: I am sorry. I think it was confined to Bones, Your Honor. I stand corrected.

THE COURT: Do you have any further objection to the charge?

MR. CASEY: Yes, I object to the charge that they can award the plaintiff Haynes for permanent injury since the only testimony that she was suffering from permanent injury was the testimony of Dr. Cox and based upon an examination which was reported to plaintiffs' attorney in a report dated June 28, 1962, which report was never furnished to the defendant pursuant to the pretrial order even though the pretrial order additionally observed that at the time of pretrial, the plaintiff was without a report supporting that claim.

I have nothing further, Your Honor.

THE COURT: Very well.

32 (In Open Court:)

THE COURT: When the witnesses were identified in this case, I anticipated that the case would take longer to try then it actually did. It is the Court's experience that in the average case of this kind, it takes a day to hear three witnesses so that if I see twelve witnesses, I think we have a four-day trial. This case has gone rather quickly for the number of witnesses. No one has succumbed to the virus, cold or pre-indulgence in the Christmas spirit and, consequently, having the first twelve jurors still remaining in the box, it will be unnecessary for the alternate to participate further in the case. I will ask you to take a seat in the courtroom.

(Alternate juror complied.)

THE COURT: Upon reaching your jury room, you will select one of your members to serve as foreman. The foreman will preside at your deliberations and speak for you in advising the Court of your verdict.

There is no time pressure upon you from the viewpoint of reaching a verdict in this case. At approximately a quarter after twelve if you have not reached a verdict, the Marshal will escort you to luncheon and after luncheon, you will return to the jury room to continue your deliberations. If you have not reached a verdict by approximately five o'clock, the Court will bring you back into the courtroom, caution

33 you not to discuss the facts in the case with anyone and excuse you until ten o'clock tomorrow morning when you will again return to the juryroom to continue your deliberations.

I tell you this, not knowing how long you will require to deliberate in this case, only to emphasize the fact that if you have not reached a verdict by approximately five o'clock, the Court is not going to lock you up and keep you here all night or anything of that kind. You will be released at approximately the same time that the Court closes every day to return tomorrow morning if that is necessary in reaching your verdict.

The jury may retire, Mr. Marshal.

(Whereupon, at 11:00 a.m., the jury retired to the jury room to commence its deliberations.)

THE COURT: Thank you, gentlemen. The Court will not require your continued presence here awaiting this verdict. If you will let the Clerk know where you can be reached by telephone within 15 or 20 minutes, you may be excused on that basis.

If there is no verdict by approximately quarter of five, I would suggest that if you want to be here when the Court sends the jury home for the evening, you come to the courtroom without waiting to be called. In other words, we won't call you to come down for the sending home
34 of the jury but you can come down on your own.

* * * * *

(Whereupon, at 3:30 p.m. the same day, the following proceedings ensued:)

THE COURT: Shortly after two o'clock, the Marshal was handed the following note from the jury room:

"Your Honor, the members of the jury would like to see photos of Mr. King's car and copy of the police officer's accident report."

At that time, the Court sent in to the jury room Plaintiffs' Exhibits Nos. 1 and 2 and Defendant's Exhibit No. 1, the police officer's report.

(Whereupon, the jury returned to the court room to return its verdict, as follows:)

THE DEPUTY CLERK: Are you the foreman of the jury?

THE FOREMAN: Yes, sir.

THE DEPUTY CLERK: Has the jury agreed upon a verdict?

THE FOREMAN: Yes, they have.

THE DEPUTY CLERK: In the complaint of the plaintiff Dorothy M. Bones against the defendant Helen I. Coolidge, do you find for the plaintiff Dorothy M. Bones or for the defendant Helen I. Coolidge?

35 THE FOREMAN: We find the defendant not guilty.

THE DEPUTY CLERK: In the complaint of the plaintiff Bernard L. King against the defendant Helen I. Coolidge, do you find for the plaintiff Bernard L. King or for the defendant Helen I. Coolidge?

THE FOREMAN: For the defendant.

THE DEPUTY CLERK: In the complaint of the plaintiff Dorothy L. Haynes against the defendant Helen I. Coolidge, do you find for the plaintiff Dorothy L. Haynes or for the defendant Helen I. Coolidge?

THE FOREMAN: For the defendant.

THE DEPUTY CLERK: Members of the jury, your foreman has said in the complaint of Dorothy M. Bones against the defendant Helen I. Coolidge that you find for the defendant Helen I. Coolidge and in the complaint of Bernard L. King against the defendant Helen I. Coolidge that you find for the defendant Helen I. Coolidge and in the complaint of Dorothy L. Haynes against the defendant Helen I. Coolidge that you find for the defendant Helen I. Coolidge, and this is your verdict so say you each and all?

(The jurors indicated affirmation.)

MR. KENNAHAN: May we have the jury polled, Your Honor?

THE COURT: You may.

36 THE DEPUTY CLERK: Members of the jury, I will repeat your verdict as stated by your foreman and then I will inquire individually of each of you if this is your verdict.

In the complaint of Dorothy M. Bones against the defendant Helen I. Coolidge, you find for the defendant Helen I. Coolidge; in the complaint of the plaintiff Bernard L. King against the defendant Helen I. Coolidge, you find for the defendant Helen I. Coolidge; and in the complaint of Dorothy L. Haynes against the defendant Helen I. Coolidge, you find for the defendant Helen I. Coolidge.

James G. Kiefer, Sr., is this your verdict?

JUROR KIEFER: Your Honor, I would like to ask one question. Should I answer yes or no?

THE COURT: That is correct. Is this your verdict?

JUROR KIEFER: Well, there is one --

THE COURT: Is this your verdict?

JUROR KIEFER: There is one part towards the last part I didn't quite get, I didn't understand too well.

THE COURT: Will you repeat the verdict, Mr. Clerk.

THE DEPUTY CLERK: In the complaint of Dorothy M. Bones against the defendant Helen I. Coolidge, you find for the defendant Helen I. Coolidge; in the complaint of Bernard L. King against the defendant Helen I. Coolidge, you find for the defendant Helen I. Coolidge;

37 in the complaint of Dorothy L. Haynes against the defendant Helen I. Coolidge, you find for the defendant Helen I. Coolidge.

James G. Kiefer, Sr., is this your verdict?

JUROR KIEFER: Yes.

THE DEPUTY CLERK: Mrs. Dorothy B. Akins, is this your verdict?

JUROR AKINS: Yes.

THE DEPUTY CLERK: Ben A. Crumlin?

JUROR CRUMLIN: Yes, sir.

THE DEPUTY CLERK: Albert E. Johnson?

JUROR JOHNSON: Yes.

THE DEPUTY CLERK: Miss Georgia M. Simpson?

JUROR SIMPSON: Yes.

THE DEPUTY CLERK: William M. Clark, Sr.?

JUROR CLARK: Yes.

THE DEPUTY CLERK: Miss Agnes A. Conniff?

JUROR CONNIFF: Yes.

THE DEPUTY CLERK: Mrs. Mackie E. Garrett?

JUROR GARRETT: Yes.

THE DEPUTY CLERK: Miss Helen L. Klassen?

JUROR KLASSEN: Yes.

THE DEPUTY CLERK: Miss Selma E. Allen?

JUROR ALLEN: Yes.

38 THE DEPUTY CLERK: James L. Haley?

JUROR HALEY: Yes.

THE DEPUTY CLERK: Carl Covington, Jr.?

JUROR COVINGTON: Yes.

THE DEPUTY CLERK: The jury has been polled, Your Honor.

THE COURT: Thank you, ladies and gentlemen of the jury, for the careful attention you have given to this case.

* * * * *

[Filed Dec. 19, 1962]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Dorothy M. Bones Bernard L. King Dorothy L. Haynes Plaintiffs. vs. Helen I. Coolidge Defendant	)	CIVIL NO. 712-60

VERDICT AND JUDGMENT

This cause having come on for hearing on the 17th day of December, 1962, before the Court and a jury of good and lawful persons of this district, to wit:

* * * * *

who, after having been duly sworn to well and truly try the issues between Dorothy M. Bones, Bernard L. King and Dorothy L. Haynes, plaintiffs and Helen I. Coolidge, defendant and after this cause is heard and given to the jury in charge, they upon their oath say this 19th day of December, 1962, that they find for the defendant against said plaintiffs.

WHEREFORE, it is adjudged that said plaintiffs take nothing by this action, that said defendant go hence without day, be for nothing held and recover of plaintiffs her costs of defense.

By /s/ William A. Heede
Deputy Clerk.

By direction of
HARRY M. HULL, Clerk

EDWARD A. TAMM
Judge

[Filed Dec. 28, 1962]

MOTION FOR NEW TRIAL

Come now the plaintiffs, Dorothy Bones, Bernard King and Dorothy Haynes, and move this Court to set aside each of the verdicts of the jury and judgments entered thereon returned herein December 19, 1962, and to grant a new trial for each of the herein plaintiffs on the following grounds:

1. The verdicts against each of the herein plaintiffs are contrary to the law.

2. The verdicts against each of the herein plaintiffs are contrary to the evidence.

3. The evidence in the case established and defendant admitted that she had told the police that the defendant ran her vehicle through a red light, clearly an act of negligence, and became thereby liable to plaintiff, Dorothy Haynes, a passenger in the vehicle operated by plaintiff Bones and owned by plaintiff King, entitling plaintiff Haynes to a verdict against the defendant.

4. The evidence in the case failed to show any contributory negligence on the part of the plaintiff Haynes, and she was therefore entitled to a verdict against the defendant whose primary negligence was established by the evidence.

5. The evidence on the issue of the contributory negligence of the plaintiff Bones, was totally insufficient to support the defendant's burden of proof on said issue and cannot sustain the verdict of the jury in favor of the defendant as to plaintiff Bones.

6. The evidence on the issue of the contributory negligence of the plaintiff Bones being totally insufficient to support the defendant's burden of proof on said issue, the verdict of the jury in favor of the defendant as to plaintiff King, the owner of the vehicle, likewise cannot be sustained.

7. The verdict of the jury herein against plaintiff Haynes appears to have been rendered as a result of the failure of the Court to make

clear to the jury that the contributory negligence of plaintiff Bones would not bar plaintiff Haynes from a recovery against the defendant. See affidavits of jurors annexed hereto as Exhibits A, B, C and D, which are, incorporated herein and made a part hereof.

8. The Court erred in refusing request of plaintiffs' counsel to clarify the law governing the passenger status of plaintiff Haynes. Plaintiffs' counsel, at the conclusion of the Court's charge, requested that the Court make clear that a finding by the jury against plaintiff Bones did not require a finding against plaintiff Haynes, a passenger. See Excerpt of Proceedings annexed hereto as Exhibit E, which is incorporated herein and made a part hereof.

9. The Court erred in refusing to further clarify the law of contributory negligence as it related to plaintiff Haynes, although acknowledging that the jury "will have same trouble about it. . ." See Exhibit E.

10. The Court erred in refusing to instruct the jury that the contributory negligence of plaintiff Bones would not be imputable to her passenger, plaintiff Haynes, as requested by plaintiffs' counsel. See Exhibit B; also see Exhibit A, B, C and D.

WHEREFORE, counsel for plaintiffs, for the grounds stated and for such other reasons as may develop upon hearing of the herein motion, move this Honorable Court to grant the herein motion for a new trial as to each of the plaintiffs, as the verdicts rendered herein are against the clear weight of the evidence and result in a miscarriage of justice.

Respectfully submitted,

/s/ John E. Kennahan

[Certificate of Service]

[Filed Dec. 28, 1962]

EXHIBIT A

AFFIDAVIT

I, James G. Kiefer, Sr., juror #183 in the case of Bones v. Coolidge, swear to the truth of the following:

1. That I found the driver Coolidge and the driver Bones both negligent.

2. That I was persuaded by my fellow jurors that inasmuch as there was a finding that both drivers were at fault that the passenger Haynes could not recover and that no special attention had been given to her status as a passenger.

3. That I was in doubt that the court had instructed us to find against the passenger, Mrs. Haynes, if there was a finding against her driver, Miss Bones. I requested clarification on this but the foreman told me that as both drivers were at fault, Mrs. Haynes, the passenger, could not recover.

/s/ James G. Kiefer, Sr.

[JURAT - Dated Dec. 20, 1962]

[Filed Dec. 28, 1962]

EXHIBIT B

AFFIDAVIT

I, Selma E. Allen, juror #2 in the case of Bones v. Coolidge swear to the truth of the following: The jury found both drivers negligent.

The Court did not instruct the jurors that we could give a verdict to the passenger, Haynes, if we found against her driver, Bones. If the Court did give this instruction I did not understand it nor did my fellow-jurors. Had we understood that a verdict could be returned for

the passenger although Miss Bones was negligent we would have done so.

/s/ Selma E. Allen

[JURAT - Dated Dec. 20, 1962]

[Filed Dec. 28, 1962]

EXHIBIT C
AFFIDAVIT

I, Mrs. Mackie E. Garrett, as juror #152 in the case of Bones v. Coolidge, found Mrs. Coolidge and Miss Bones guilty of negligence and contributory negligence, respectively, in the automobile accident in which they were involved on February 27, 1960.

In deliberating the case, I expressed the need for clarification of the Court's instructions as to whether, under such a finding, Miss Haynes could recover from the defendant, Mrs. Coolidge. I recommended that the foreman of the jury requst such clarification from the Court. The foreman and the majority of the other jurors stated, substantially, that it was their understanding from the instructions of the Court and prior experience in such cases that Miss Haynes could not recover from the defendant, Mrs. Coolidge under a finding that the driver of the car in which she was a passenger was guilty of contributory negligence. I accepted this interpretation of the law and thereafter gave no particular attention to passenger Haynes' claim.

Had I understood the Court's instructions to permit a verdict for Miss Haynes even though her driver was contributorily negligent I would have found a verdict for her.

/s/ Mrs. Mackie E. Garrett

[JURAT - Dated Dec. 21, 1962]

[Filed Dec. 28, 1962]

POINTS AND AUTHORITIES

Rule 59 Federal Rules of Civil Procedure.

/s/ John E. Kennahan

[Certificate of Service]

[Filed Jan. 14, 1963]

ORDER

Upon consideration of the Motion for new trial filed herein December 28, 1962, it is this 11th day of January, 1963,

ORDERED that the above motion be, and the same hereby is denied.

By direction of
Edward A. Tamm
Judge
* * *

[Filed Jan. 31, 1963]

NOTICE OF APPEAL

Notice is hereby given this 22nd day of January, 1963, that plaintiff, Dorothy L. Haynes, hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 19th day of December, 1962 in favor of defendant, Helen Coolidge against said Dorothy L. Haynes.

/s/ Joseph D. Bulman
Attorney for Plaintiff
* * *

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA

No. 17,721

DOROTHY HAYNES,

Appellant,

v.

HELEN COOLIDGE,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FRANCIS L. CASEY, JR.
800 Colorado Building
Washington 5, D. C.
Attorney for Appellee

HOGAN & HARTSON
Of Counsel

QUESTIONS PRESENTED

1. Is it error for a trial judge to deny an oral request for an additional instruction at the close of his charge to the jury, when the court has already fully and correctly instructed the jury on the same point, although in a different fashion? The appellant contends that it is error. The appellee contends that it is not.

2. Is it reversible error for the District Court to deny a motion for a new trial based on affidavits of three jurors impeaching their own verdict on the ground that deliberations in the jury room disclosed that some jurors misunderstood one part of the trial judge's instruction? Appellant contends that it is and appellee contends that it is not.

3. Did the District Court abuse its discretion in failing to grant appellant a new trial on the ground of confusion among the jurors in returning the verdict when the verdict was read verbatim before the poll of the jury and the first juror asked if this was his verdict explained that there was one part toward the end that he "didn't quite get," and when the verdict was again read verbatim, he said that was his verdict as did the eleven other jurors? Appellant contends that there was an abuse of discretion. Appellee contends that there was not.

INDEX

TABLE OF CASES

TABLE OF TREATISES, TEXTS, ETC.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,721

DOROTHY HAYNES,

Appellant,

v.

HELEN COOLIDGE,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

The appellant was a passenger in an automobile, that was driven by Dorothy M. Bones and owned by another passenger Bernard L. King, when it was in a collision with an automobile driven by the appellee. (J.A. 1, 2). All three occupants of Mr. King's automobile brought actions for damages arising from alleged personal injuries in one suit against the appellee. (J.A. 1, 2, 3).

The appellee pleaded the defense of contributory negligence to the claims of the driver and owner of the automobile in which the appellant was allegedly injured. (J.A. 4, 8, 9). In its charge to the jury the District Court gave the following instructions regarding that defense:

> "There is in this case, in addition to the charge of negligence made by these plaintiffs against the defendant a countercharge in which the defendant charges the plaintiff driver of the car with contributory negligence. What, then, is the definition of contributory negligence?
>
> "Contributory negligence is negligence on the part of the person complaining, that is, the plaintiffs or a plaintiff, which combining in some degree with the negligence of another helps in proximately causing the injury of which the plaintiff complains.
>
> "If you find that the plaintiff Dorothy M. Bones was guilty of contributory negligence, you should find for the defendant as between Dorothy M. Bones and the defendant and also for the defendant as to the plaintiff Bernard L. King for reasons which I will explain to you in a few minutes, because one who is guilty of contributory negligence may not recover from another for the injuries sustained.
>
> "To repeat this point, a person who is guilty of contributory negligence, that is, a person whose negligence contributes in any degree to the causing of an accident, may not recover from any other person who was negligent in that accident. This is the doctrine of contributory negligence recognized as the law in this jurisdiction." (J.A. 18, 19)
>
> * * *
>
> "The burden of proof to prove contributory negligence is, of course, upon the defendant under the requirements for burden of proof that I have previously outlined to you." (J.A. 19).
>
> * * *
>
> "To return for a moment to this matter of contributory negligence, you are instructed that because the plaintiff Miss Bones was driving an automobile owned by the plaintiff Mr. King with his permission,

she was by law his agent while driving the car and, therefore, any negligence or contributory negligence on her part must be imputed to him if you find her guilty of contributory negligence. For that reason, you must find for the defendant against the plaintiffs Bones and King in the event that you find that any negligence on the part of Miss Bones was one of the proximate causes of the collision.

"This is a general statement of the law of agency insofar as it applies to the operation of automobiles in the District of Columbia. We have a statute which says very concisely and very explicitly that anyone who operates an automobile with the permission of the owner is for legal purposes the agent of the owner and, consequently, the negligence of the driver of the automobile may be charged and is charged by law to the owner of the automobile." (J.A. 22).

* * *

"The Court has spent 45 minutes in defining various terms of law, various requirements of the law in an effort to assist you in reaching a verdict in this case. As a practical matter, how can you go about applying this 45-minute instruction to the facts in this case? I would suggest that, under your foreman's direction, you carry out a series of questions to yourselves somewhat like the following outline:

"Ask yourselves first: Was the defendant negligent? If your answer to this question is no, you find for the defendant, and that is the end of your responsibility. If however you answer this question yes, the defendant was negligent, then you ask yourselves a second question: Was the defendant's negligence the proximate cause of the injury to the plaintiffs? If your answer to this question is no, then your verdict is for the defendant. If your answer to this question is yes, then you go to the third question: Was the plaintiff Dorothy M. Bones guilty of contributory negligence? If your answer to this question is yes, then you find for the defendant against the plaintiffs Bones and King and go on to the question of damages as to the plaintiff Haynes. If your answer to this question is no, that is, the plaintiff Dorothy M. Bones was not guilty of contributory negligence, then you go to the question of damages as to all of the plaintiffs." (J.A. 27, 28). (emphasis supplied).

At the end of its charge to the jury, the District Court invited counsel to the Bench where the record was preserved as to prayers for instructions previously offered and denied and any objections to the charge previously made and both attorneys were asked if they had any requests for additional instructions or objections to the charge as given by the Court. (J.A. 29). When appellant's attorney was asked if he had any request for any further charge, the following transpired:

> "Mr. Kennahan: The only item that I think probably is not clear is this: It has been made quite clear that if there is a finding against Miss Bones, then it precludes King from recovery. It is not quite so clear if the jury makes this finding against Miss Bones that it does not preclude Mrs. Haynes from recovering. (emphasis supplied).
>
> "The Court: The Court confined its instruction on the matter of contributory negligence to Dorothy M. Bones and Bernard L. King. In outlining the questions that the jury should ask themselves, I pointed out they should determine first negligence, then proximate cause, then contributory negligence. The Court said affirmatively if they find contributory negligence on the part of Dorothy M. Bones, they should find for the defendant as against Dorothy M. Bones and Bernard L. King, and proceed to the question of damages with reference to the plaintiff Haynes. (emphasis supplied).
>
> "I don't think I can make it any clearer. I am sure they will have some trouble about it but I have made it as clear as I can.
>
> "Do you have any other objections to the charge other than those already made and renewed for the record?
>
> "Mr. Kennahan: No, Your Honor." (J.A. 29, 30).

The Court had already instructed the jury that there were three plaintiffs and three separate cases, all against one defendant before them and that when they returned with their verdicts, the foreman would be called upon by the clerk to announce an individual verdict in each case. (J.A. 28, 29). The jury returned an individual verdict

against each of the three plaintiffs. (J.A. 33, 34). At the request of the appellant and her fellow plaintiffs the jury was then polled:

> "The Deputy Clerk: Members of the jury, I will repeat your verdict as stated by your foreman and then I will inquire individually of each of you if this if your verdict.
>
> "In the complaint of Dorothy M. Bones against the defendant Helen I. Coolidge, you find for the defendant Helen I. Coolidge; in the complaint of the plaintiff Bernard L. King against the defendant Helen I. Coolidge, you find for the defendant Helen I. Coolidge; and in the complaint of Dorothy L. Haynes against the defendant Helen I. Coolidge, you find for the defendant Helen I. Coolidge.
>
> "James G. Kiefer, Sr., is this your verdict?
>
> "Juror Kiefer: Your Honor, I would like to ask one question. Should I answer yes or no?
>
> "The Court: That is correct. Is this your verdict?
>
> "Juror Kiefer: Well there is one —
>
> "The Court: Is this your verdict?
>
> "Juror Kiefer: There is one part towards the last part I didn't quite get, I didn't understand too well.
>
> "The Court: Will you repeat the verdict, Mr. Clerk.
>
> "The Deputy Clerk: In the complaint of Dorothy M. Bones against the defendant Helen I. Coolidge you find for the defendant Helen I. Coolidge, in the complaint of Bernard L. King against the defendant Helen I. Coolidge you find for the defendant Helen I. Coolidge; in the complaint of Dorothy L. Haynes against the defendant Helen I. Coolidge, you find for the defendant Helen I. Coolidge.
>
> "James G. Kiefer, Sr., is this your verdict?
>
> "Juror Kiefer: Yes." (J.A. 34, 35).

The other eleven jurors simply answered — "yes," when their names were called in the poll. (J.A. 35).

The appellant and her fellow plaintiffs then filed a motion for a new trial supported by affidavits from three of the jurors, that were obtained in two instances on the day following the return of the verdicts at 3:30 P.M. on December 19, 1962, and in the other instance on the second day following the return of the verdicts. (J.A. 33, 37, 39, 40). Appellee's attorneys were not at liberty to interview the discharged jurors and to seek contradictory or explanatory affidavits because of the ethical prohibition against such an effort. The motion for new trial was denied and this appeal followed. (J.A. 41).

SUMMARY OF ARGUMENT

The District Court's charge to the jury regarding the defense of contributory negligence was entirely proper and it did not contain any suggestion that that defense could defeat the appellant's action.

It would have been improper for the District Court to have set aside the verdict against the appellant on the impeachment of that verdict by three of the jurors who returned it. It is the settled rule in this jurisdiction as well as the general rule and prevailing federal rule that affidavits of jurors will not be entertained to impeach their verdict, unless those affidavits relate to extraneous influences brought to bear upon the jurors.

When the poll of the jury, confirming the verdicts announced by its foreman, was completed there was no apparent confusion among the jurors nor was there any attendant circumstance suggesting that further deliberation by the jury was in order. All twelve members had assented individually to the verdicts.

ARGUMENT

I

The Trial Judge's Instructions on the Defense of Contributory Negligence Were Entirely Proper.

Appellant's attack on the District Court's charge on contributory negligence does not cite any error in those instructions, but merely suggests how her attorneys believe they might have been improved.

When appellant's brief quotes from the portion of the instructions that she would have supplemented with a specific reference to Mrs. Haynes, it fails to indicate that the charge on contributory negligence did not stop there. That same paragraph of the charge went on to state:

> "For that reason, you must find for the defendant against plaintiffs Bones and King in the event that you find that any negligence on the part of Miss Bones was one of the proximate causes of the collision." (J.A. 22). (emphasis supplied).

The following paragraph explained the statutory basis for imputing the negligence of the driver of an automobile to the owner, with whose permission she was driving the car and later the trial court in outlining the issues to be resolved by the jury, instructed as follows after covering the question of whether the appellee was guilty of primary negligence:

> "If your answer to this question is yes, then you go to the third question: Was the plaintiff Dorothy M. Bones guilty of contributory negligence? If your answer to this question is yes, then you find for the defendant against the plaintiffs Bones and King and go on to the question of damages as to the plaintiff Haynes." (J.A. 28). (emphasis supplied).

In view of the foregoing and the court's earlier instructions to the jury that it was Miss Bones that was charged with contributory negligence and that if the jury should find that, in fact, Miss Bones was guilty of contributory negligence, the jury should find for the defendant, "as between Dorothy M. Bones and also for the defendant as to the plaintiff

Bernard L. King for reasons which I will explain to you in a few minutes * * *," (J.A. 18, 19) (emphasis supplied), appellant's suggested addition to the charge would have been redundant.

This Court has often held that it is not error for a trial court to refuse to give a requested instruction when the court has already correctly given the instruction in substance. Lippman v. Williams, 79 U.S. App. D.C. 334, 147 F.2d 150 (1945); Baltimore & Ohio R.R. v. Corbin, 73 U.S. App. D.C. 124, 118 F.2d 9 (1940); McCarthy v. Holmquist, 70 App. D.C. 334, 106 F.2d 855 (1939), and Madison v. White, 60 App. D.C. 329, 54 F.2d 440 (1931).

In Madison v. White, supra, this Court explained:

> "Furthermore, as said in Gleason v. Virginia Midland R.R. Co., 1 App. D.C. 187; it has been repeatedly determined, and needs no citation of authorities, that if the propositions of law are fairly and justly stated to the jury, and all points of requested instructions covered, the refusal of particular requests, though correct statements in themselves, is not error."

Here the appellant did not offer a prepared instruction on the point she raises on appeal. Her attorney merely observed that it was "not quite so clear," that contributory negligence was not to be imputed to the appellant. (J.A. 30). In view of the full and accurate instruction that had been given on that subject, it certainly was not error for the court below to refuse to repeat or restate any part of it.

II

The District Court Did Not Err in Denying Appellant's Motion for a New Trial Predicated on Affidavits of Three Jurors That Impeached the Verdict They Had Returned.

In refusing to grant a new trial on a motion grounded on affidavits of jurors that impeached their own verdict, the District Court ruled in accord with one of the most firmly established rules applicable to jury

trials. The public policy, in the interest of an orderly administration of justice, which prohibits jurors from impeaching their verdict is well expressed by language of the Supreme Court in McDonald v. Pless, 238 U.S. 264 (1915); which has been quoted and followed by this Court in Orenberg v. Thecker, 79 U.S. App. D.C. 149, 143 F.2d 375 (1944), and Economon v. Barry-Pate Motor Co., 50 App. D.C. 143, 3 F.2d 84 (1925):

> "[L]et it once be established that verdicts solemnly made and publicly returned into court can be attacked and set aside on testimony of those who took part in their publication and all verdicts could be, and many would be, followed by an inquiry in the hope of discovering something which might invalidate the finding. Jurors would be harassed and beset by the defeated party in an effort to secure from them evidence of facts which might establish misconduct sufficient to set aside a verdict. If evidence thus secured could be used, the result would be to make what was intended to be a private deliberation, the constant subject of public investigation — to the destruction of all frankness and freedom of discussion and conference." 238 U.S. at 267-68.

In Economon v. Barry-Pate Motor Co., supra, eight jurors joined in an affidavit which explained that they had found for the defendant only because they believed that a non-party was jointly responsible with the defendant and therefore, the defendant should not bear the burden of payment to the plaintiff alone. Our District Court refused to consider the affidavit and this Court affirmed, holding that:

> "In unmistakable language both this court and the Supreme Court of the United States have held the general rule to be that the testimony of jurors will not be received to impeach their verdict, unless such testimony relates to extraneous influences brought to bear upon them."

In Orenberg v. Thecker, supra, a new trial was sought by the losing party in a motion supported by the affidavits of several jurors which stated that two of the jurors had privately visited the scene of the accident and one of them had made observations, inspections and

experiments at the scene which both reported to their fellow jurors. The affidavits were rejected by the District Court in denying the motion for a new trial and this Court affirmed following McDonald v. Pless, supra, and Economon v. Barry-Pate Motor Co., supra. The same rule has been followed by this Court in a criminal appeal, Hyde v. United States, 35 App. D.C. 451 (1910), aff'd. 225 U.S. 347 (1912). In Fried v. McGrath, 77 U.S. App. D.C. 385, 135 F.2d 833 (1943), the general rule was observed, but held to be inapplicable where the affidavits did not impeach the jury's verdict, but simply explained what the verdict was, i.e., a verdict of $850 against both defendants rather than a verdict of $425.

Reviewing the Federal authorities no exception has been found to the statement that, "the general rule is, that affidavits of jurors will not be received to prove any mistake of the evidence or misapprehension of the law, on the part of the jury. * * * The verdict, in which they all concur, must be the best evidence of their belief, both as to the fact and the law, and therefore, must be taken to be conclusive." Bateman v. Donovan, 131 F.2d 759, 765 (9th Cir. 1942). In accord with this statement of the rule are the following authorities: Poindexter v. Groves, 197 F.2d 915 (2nd Cir. 1952); Department of Water and Power v. Anderson, 95 F.2d 577 (9th Cir.), cert. denied, 305 U.S. 607 (1938); Southern Pac. Co. v. Kling, 65 F.2d 85 (10th Cir.), cert. denied, 290 U.S. 657 (1933); Consolidated Rendering Co. v. New Haven Hotel Co., 300 Fed. 627 (D. C. Conn. 1924); 6 Moore, Federal Practice, ¶ 59.08 at 3811-12 (1953); 53 Am. Jur. Trial § 1106 (1945).

The inherent unfairness of an attack on a verdict, such as the appellant has made here may not be as patent as the disorder it would create in the administration of justice. Consider the position in which it places a party such as the appellee. She has been awarded a unanimous verdict that is consistent with her denial of any negligence that was a proximate cause of the accident. When affidavits of jurors are advanced

impeaching that verdict, she is denied the fundamental rights of offering evidence in the nature of cross-examination impeachment or rebuttal. Inquiry has confirmed her attorney's understanding that he is forbidden by the Canon of Ethics of his profession from interviewing the jurors.

Even though the foreman of the jury may protest to appellee's attorney of the harassment the jurors are undergoing on the evening of the verdict and on the following day and volunteer that the jury had found the appellee free of negligence, the appellee's attorney may not ethically make inquiry regarding the deliberations in order to meet the affidavits obtained from three of the twelve. Opinion 109, American Bar Association Standing Committee on Professional Ethics and Grievances; Informal Decisions 257 and 258 of the same Committee and Texas Opinion 26.

Because it is dispositive of appellee's attorney's ability to meet the attack on the verdict made by the appellant, A.B.A. Op. 109 is quoted in full as follows:

OPINION 109

(March 10, 1934)

"LAWYER'S CONDUCT TOWARD JURY -- A lawyer ethically has no right, after verdict, to seek out one or more members of a jury before whom he has tried a case and question them concerning how certain aspects of the case impressed them, what they thought of certain evidence on both sides of the case, and how certain members of the jury stood on certain questions, even assuming that the lawyer did so for the purpose of informing himself as to any mistakes he may have made in the presentation of evidence or of testing his judgment in selecting members of the panel.

"A member of the Association has presented to the committee the following question:

> The writer has been criticized for certain conduct in connection with jury trials; and I am submitting herewith a statement of facts with the request that you return an opinion thereon. After the jury had returned a verdict in cases in which the writer has been active in trying, the writer has made it a point to seek out one or more members of the panel and question them concerning how certain aspects of the case impressed them, what they thought of certain evidence on both sides of the case, and how certain members of the jury stood on certain questions. The writer was doing this for the purpose of informing himself as to any mistakes he may have made in the presentation of evidence, and also to test his judgment in selecting members of the panel.
>
> It is my belief that most, if not all practicing attorneys, pursue the same course. Canon 23 of the Professional Ethics of the American Bar Association does not touch the point.

Canon 23
Opinions 37, 39, 49, 71, 77, 83

"The committee's opinion was stated by Mr. Carney, Messrs. Sutherland, Hinkley, Strother, Martin, Phillips and Harris concurring.

"The precise ethical question presented is whether or not it is professionally proper for a lawyer to interview, after verdict, jurymen who were on the panel as to what took place in the jury room and as to what the salient points were which caused the jury to arrive at a given verdict. The question assumes that the inquiries are directed by the lawyer for his own information and benefit. Before categorically answering the question, it would seem expedient, if not necessary, to cite a few of the numerous decisions in respect of the secrecy of the jury room and the immunity of jurors from interrogation as to their verdict.

"Previous to the nineteenth century, the earlier authorities might not have been uniform. Since the beginning of the nineteenth century, there probably has been no English case in which, after the return and affirmance of a verdict in open court, the testimony of jurors as to the motives and influences by which their deliberations were governed has

been admitted in court. Owen v. Warburton, 1 N.R. 326; Straker v. Graham, 7 Dowl. 223, 225; Burgess v. Langley, 1 D. & L. 21, 23; Raphael v. Bank of England, 17 C.B. 174; Standewick v. Hopkins, 14 L.J. (Q.B.) 16.

"Baron Alderson said in the Straker case that 'It is entirely against public policy to allow a juryman to make affidavit of anything that passes in agreement to a verdict.' This statement was quoted with approval by Chief Justice Tindal in the Burgess case.

"The cases in the United States are overwhelmingly to the same effect. (See Wigmore on Evidence (2nd Ed.), Vol. V, s. 2345-2358).

"In Woodward v. Levitt (1871), 107 Mass. 453, where will be found a collection of English and United States cases, the court said at p. 460, 'The proper evidence of the decision of the jury is the verdict returned by them upon oath and affirmed in open court; it is essential to the freedom and independence of their deliberations that their discussions in the jury room should be kept secret and inviolable; and to admit the testimony of jurors to what took place there would create distrust, embarrassment and uncertainty.' To the same effect see Clark v. United States (1933), 289 U.S. 1: 53 Sup. Ct. Rep. 465, where Mr. Justice Cardozo said at page 13: "For the origin of the privilege we are referred to ancient usage, and for its defense to public policy. Freedom of debate might be stifled and independence of thought checked if jurors were made to feel that their arguments and ballots were to be freely published to the world." The same judge said in the same case at page 16: "No doubt the need is weighty that conduct in the jury room shall be untrammeled by the fear of embarrassing publicity. The need is no less weighty that it shall be pure and undefiled. A juror of integrity and reasonable firmness will not fear to speak his mind if the confidences of debate are barred to the ears of mere impertinence or malice."

"It therefore may properly be concluded that the English cases, the cases of the various state courts, and the decisions of the United States Supreme Court, do not permit to be introduced into evidence discussions in the jury room, as to the manner in which a jury arrived at any given verdict. This conclusion is supported, as above pointed out, by reasons of ancient usage and public policy.

"Canon 23, among other things, provides that 'A lawyer must never converse privately with jurors about the case; and both before and during the trial he should avoid communicating with them, even as to matters foreign to the cause.' Many times it has been pointed out in our opinions that a lawyer, like Caesar's wife, should be above suspicion. See Opinions 37, 39, 49, 71, 77 and 83.

"If, after verdict, a juryman wishes to talk upon interrogation by one of the lawyers who tried the case, one or more ethical questions present themselves. As far as the juror is concerned, is he to be subjected to embarrassment as to what reasons led him and the other jurymen on the panel to arrive at a given verdict? As far as the lawyer is concerned, he is prying into deliberations which, by reason of public policy, should be inviolate. Further, in questioning a juror about the motives prompting the jury's verdict, he is indirectly soliciting disclosures about the conduct of other members of the jury without their consent. As a practical matter, what security has the lawyer that he is obtaining a fair representation of what took place in the jury room? If, as is likely to be the case, the juror, instead of relaying accurately the effect which the conduct of the lawyer produced, tempers it with charity, it may prove harmful instead of helpful. As far as the public is concerned may it not occur to them, especially where the attorney has pending other cases upon which the same panel of jurors may sit in judgment, that the lawyer is covertly attempting 'to curry favor with juries by fawning, flattery or pretended solicitude' contrary to the provisions of Canon 23.

"This opinion, of course, is not intended to extend to a situation where there has been a mistake in the announcing or recording of a verdict, and in the protection of his client's interests, it may be necessary for a lawyer to interview members of the jury to prevent a miscarriage of justice. Nor does it extend to a case where a juror has been guilty of fraud. See Clark v. United States, 281 U.S. 1, 53 Sup. Ct. Rep. 465. Compare note in 47 Harvard Law Review 717 (Feb., 1934) on United States v. Pleva, 66 F.2d 529 (C.C.A. 2d, 1933).

"The committee is of opinion that, upon facts stated, the conduct of the lawyer is unethical. It tends to destroy the secrecy which should, on account of ancient usage and public policy, safeguard the activities in the jury room."

The authoritative Drinker, Legal Ethics (1953), relying on A.B.A. Op. 109 and Texas Op. 26 states that:

> "A lawyer may not, even after verdict, seek out individually jurors and interview them as to what went on in a jury room, and as to what were the salient points deemed by them of importance in reaching their verdict, even though the lawyer's purpose has no relation to the case which they decided and is solely for the improvement of his jury technique. A lawyer may not write to or communicate with jurors either before or after trial. Jurors should conduct their deliberations and reach their verdict with assurance that, except for fraud, there will be no subsequent investigation by anyone of their deliberations."

At page 296 of Drinker, supra, Informal Decision 257 of the A.B.A. Committee is quoted as follows:

> "A lawyer may not write to or communicate with jurors before or after trial."

And Informal Decision 258 is also quoted:

> "Jurors should conduct their deliberations and reach their verdict with the assurance that, except for fraud, there will be no subsequent investigation by anyone of their deliberations."

Should it become the law of the District of Columbia that the District Court should have granted the appellant's motion for new trial, few verdicts will ever be the foundation of final judgments. Imagine the case where the attorney for the unsuccessful party cannot obtain one, two or three affidavits from jurors that the verdict would not have been unanimous if they had perfectly understood one facet of the court's charge. Keep in mind that the attorney for the prevailing party may observe the ethical prohibition against even interviewing that juror, and the resulting chaos is facilely foreseen.

III

Nothing That Occurred During the Poll of the Jury Warranted Granting Appellant's Motion for a New Trial.

Since appellant's motion for a new trial did not assign confusion during the poll of the jury as a ground for the requested relief and the point was not raised at any time prior to the expiration of the ten day period provided by Rule 59, Fed. R. Civ. P., the District Court should not have considered it. McCloskey v. Kane, 109 U.S. App. D.C. 217, 285 F.2d 297 (1960); Fine v. Paramount Pictures (7th Cir., 1950), 181 F.2d 300.

Further, the point was not preserved for review. The appellant did not move for a mistrial or to have the jury sent out for further deliberations or for any other relief before the jury was discharged.

It is not surprising that no issue was made regarding the propriety of the poll of the jury until a search was made for grounds upon which to attach the verdict. For all that appears, one juror did not adequately hear the last part of the clerk's reading of the verdict. When it was

re-read, he promptly said that that was his verdict,as did all of his fellow jurors.

Respectfully submitted,

FRANCIS L. CASEY, JR.
800 Colorado Building
Washington 5, D. C.

Attorney for Appellee.

HOGAN & HARTSON

Of Counsel

717

BRIEF FOR APPELLANT AND JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,721

104

DOROTHY HAYNES,

Appellant,

v.

HELEN COOLIDGE,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOSEPH D. BULMAN
SIDNEY M. GOLDSTEIN
ARTHUR S. FELD
JOHN E. KENNEHAN

820 Woodward Building
Washington 5, D. C.

Attorneys for Appellant

QUESTIONS PRESENTED

1. Where, in a suit for personal injuries resulting from a collision between two vehicles, there are multiple plaintiffs, one of whom is a passenger (appellant here) without ownership in either vehicle, and where there has been no defense or evidence of contributory negligence in regard to the passenger-appellant, and where the Court fails and refuses in its charge to the jury to explain that the law of contributory negligence does not bar the appellant passenger right to recover, in the opinion of appellant the following question is presented:

Did not the District Court commit prejudicial error in failing to instruct the jury that appellant-passenger's right to recover could not be barred by contributory negligence?

2. Where upon the poll of the jury in open Court, a juror clearly indicates his confusion with the jury finding, and the Court fails to resolve the confusion, and where said juror and other jurors file sworn statements that the verdict against appellant was due to confusion caused by the Court's instructions and where the District Court denied, without a hearing, appellant's motion for a new trial in the opinion of appellant, the following question is presented:

Did not the District Court err in denying appellant's motion for a new trial in light of the confusion presented in open Court when the jury was polled, and in light of the sworn statements that said confusion respecting the rights of appellant herein resulted from the Court's charge?

INDEX

TABLE OF CASES

TEXTS

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,721

DOROTHY HAYNES,

Appellant,

v.

HELEN COOLIDGE,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This is an appeal from the United States District Court for the District of Columbia. The jurisdiction of the District Court was based on 11 D.C. Code 306. The jurisdiction of this Court is conferred by 28 U.S. Code 1291.

STATEMENT OF THE CASE

Appellant-plaintiff, Dorothy Haynes, filed suit as co-plaintiff with plaintiffs, Dorothy M. Bones and Bernard L. King, against appellee for personal injuries sustained as the result of a motor vehicle collision occurring on February 27, 1960, in the District of Columbia. (J.A. 1) The said Bones and King are not parties to this appeal. Appellant was a passenger in the automobile operated by the said Bones and owned by the said King. (J.A. 1, 8)

Neither in defendant's answer (J.A. 4) nor pre-trial statement (J.A. 8) nor in the pre-trial order of the District Court (J.A. 8), is appellant's own negligence or contributory negligence alleged or indicated as a defense to appellant's cause of action. Nor in the course of the trial was any evidence produced establishing appellant's negligence or contributory negligence.

In its charge to the jury the District Court made no reference to appellant's passenger status nor distinguished her passenger status from that of a driver or owner. The charge explained how the law of contributory negligence would operate to bar the recovery of the plaintiff driver (Bones) and the plaintiff owner (King) but failed to explain or make clear that the law of contributory negligence would not bar the right of appellant (Haynes) a passenger, against whom there was no allegation or evidence of contributory negligence, to recover.

At the conclusion of the charge, counsel for appellant requested that the Court clarify appellant's passenger status and the operation of the law of contributory negligence with respect thereto. (J.A. 29-30) The Court declined to do so and noted appellant's objection. (J.A. 30)

A verdict was returned against the three plaintiffs, including this appellant, a passenger. (J.A. 33-34)

Counsel for appellant requested a poll of the jury. (J.A. 34-35) Upon the poll confusion was immediately evident in the replies of juror,

James S. Kiefer. (J.A. 34) Evidence of the said juror's confusion and the confusion of other jurors respecting appellant's right to recover, came to attention of appellant's counsel and jurors' sworn statements were filed in the District Court with appellant's motion for a new trial. (J.A. 39-40) The District Court denied appellant's motion without benefit of a hearing thereon. (J.A. 41)

A notice of appeal was timely filed.

STATEMENT OF POINTS

1. The verdict against appellant is contrary to law.

2. The Court erred in refusing to clarify its instruction on the law of contributory negligence as it affected appellant who was a passenger.

3. The Court erred in refusing to clarify its instruction on the passenger status of appellant.

4. The Court erred in refusing to amplify its instructions although acknowledging to counsel that the jury "will have some trouble about it."

5. The Court erred in failing to require further deliberation of the jury when confusion was apparent upon the poll.

6. The Court erred in denying appellant the opportunity of a hearing on her motion for a new trial and in failing to give any consideration to jurors' affidavits impeaching the verdict.

7. The Court charge led the jury into confusion insofar as its instructions related to appellant.

SUMMARY OF ARGUMENT

I

The District Court committed prejudicial error in failing to instruct the jury on appellant's passenger status and in failing to distinguish that status from that of plaintiff, Bones, the driver, and that of plaintiff, King, the owner. As a result of the aforesaid failure, the District Court neglected to explain that the law of contributory negligence was not applicable to appellant, a passenger. The Court's then failure to clearly exclude appellant, a passenger, from the reach of the doctrine of imputable negligence (as between driver and owner) resulted in jury confusion, and in an inadequate instruction on the law of the case, to appellant's prejudice.

The aforesaid failures were compounded when the District Court denied appellant counsel's request for an instruction explaining that the law of contributory negligence would not bar a recovery by appellant. The District Court's then denial of appellant's motion for a new trial without a hearing thereon, was, in the circumstances, prejudicial error.

II

Substantial justice to appellant, on the face of the record alone, namely,

> the transcript of the Court's charge, the colloquy between the Court and counsel following the charge, the dialogue between juror Kiefer and the Court upon the poll of the jury, and four juror affidavits,

warranted a new trial for appellant. The District Court's denial of appellant's motion for a new trial, without granting a hearing or the opportunity to file a reply to appellee's opposition constituted a clear abuse of discretion.

ARGUMENT

I

The District Court's Instruction to the Jury Was Wholly Inadequate in Failing to Distinguish Between Appellant's Passenger Status and That of the Other Plaintiffs and in Failing to Explain That the Law of Contributory Negligence Was Not Applicable to Her or a Bar to Her Recovery.

There can be no question that the purpose of a trial court's instruction is to furnish guidance to the jury in their deliberations and to thereby aid them in arriving at a proper verdict. The chief object of the court's charge is to explain the law of the case. It becomes, therefore, one of the most important duties of the court to expound the law to the jury. The trial judge, in his instructions, should inform the jury as to the law of the case that is applicable to the facts and in such a manner that the jury should not be misled. 53 Am. Jur. Trial § 509 (1945).

Appellant contends that the District Court failed to meet this standard in that it failed throughout the lengthy charge (1) to allude to appellant's passenger status (J.A. 13-29); (2) to define status and to explain the legal consequences flowing from different statuses as between a driver and passenger-owner on the one hand and a passenger who is no owner on the other (J.A. 13-29); (3) to explain the effect of the law of contributory negligence on appellant, a non-owning passenger, as distinguished from the other plaintiffs; and (4) to modify or amplify its instruction by denying appellant counsel's request for further instruction on the law of contributory negligence (J.A. 29-30).

Appellant contends that the question of her status as a passenger who had no ownership in either of the colliding vehicles was of the utmost importance. She well recognized that unless this status and its legal consequences were clearly understood by the jury she could be seriously prejudiced. Appellant had to rely upon the Court's instructions

of the law of contributory negligence to aid the jury in understanding that the law of contributory negligence would operate differently on each of the plaintiffs.

The controlling facts relative to status are as follows: the vehicle in which appellant was a passenger was owned by plaintiff King who was also a passenger in his own vehicle; plaintiff King's vehicle was driven by plaintiff Bones. (J.A. 1, 4, 8) Inasmuch as the right to recover damages is the essence of appellant's suit, it was as important for the Court to fully explain the status of the persons involved — whether driver, owner or passenger — in an automobile accident, as it is to explain the status of persons — whether invitee, licensee or trespasser — in a case of personal injury on the real property of another. As the right of a party to recover damages in the latter class of cases depends on status and its legal consequences, so too, does the right to recover damages depend on status in the former class of cases. Fifer v. United States, 93 U.S. App. D.C. 216, Baber v. Akers Motor Lines, 94 U.S. App. D.C. 211, Beck v. The Washington, Virginia and Maryland Coach Company, 95 U.S. App. D.C. 151.

The District Court instructed that if the jury found the plaintiff-driver (Bones) guilty of contributory negligence, it must also find the passenger-owner (King) guilty of contributory negligence. Certainly this was a correct statement of the law so far as it goes, but appellant contends that the instruction did not go far enough. The Court ignored the special status of appellant, also a passenger but not an owner, and with respect to whom the law of contributory negligence would not bar a recovery. On this fundamental proposition clearly delineating appellant's special status, the District Court was completely silent.

In confining the instruction on contributory negligence to Bones (the driver) and to King (the passenger-owner), the Court stated only one aspect of the law of contributory negligence. The Court stated its defensive character as to the claims of the plaintiff driver (Bones) and

the plaintiff-passenger and owner (King), but failed to state that the law of contributory negligence could not serve as a defense to the claim of another passenger who was not an owner, namely, appellant (Haynes). Clearly the instruction as it stood was an inadequate expression of the law of the case in so far as appellant was concerned.

Following the charge, appellant's counsel then addressed the Court in part as follows:

> "It has been made quite clear that if there is a finding against Miss Bones, then it precludes King from recovery. It is not quite so clear if the jury makes this finding against Miss Bones that it does not preclude Mrs. Haynes from recovering." (J.A. 30)

In part the Court replied:

> "I don't think I can make it any clearer. I am sure they will have some trouble about it but I have made it as clear as I can." (J.A. 30)

Obviously, it could have been made a great deal clearer and without difficulty and there was a positive duty to do so when the Court itself acknowledged that the jury would have trouble on the point. To illustrate how simply the District Court could have modified its instruction, appellant calls the attention of this Court to the following language from the charge:

> "To return for a moment to this matter of contributory negligence, you are instructed that because the plaintiff Miss Bones was driving an automobile owned by the plaintiff Mr. King with his permission, she was by law his agent while driving the car and, therefore, any negligence or contributory negligence on her part must be imputed to him if you find her guilty of contributory negligence." (J.A. 22)

A very simple modification as follows could have cured the Court's instruction of its defect:

> "To return for a moment to this matter of contributory negligence, you are instructed that because the plaintiff Miss Bones was driving an automobile owned by the plaintiff Mr. King with his permission, she was by law his agent while driving the car and, therefore, any negligence or contributory negligence on her part must be imputed to him if you find her guilty of contributory negligence. However, as to plaintiff Mrs. Haynes, who was a passenger, there can be no imputation of negligence if you find Bones guilty of contributory negligence. (Underlined words are the suggested amplification)

Appellant urges upon this Court that such language as suggested above, or language of like import, would have filled in the gaping hole in the Court's charge, and cured the charge of its defective character. That this could have been done very simply is too obvious to require further illustration or argument. The District Court's refusal to amplify its instruction as requested produced a confusion which is plainly in the record of the jury poll. (J.A. 28, 39, 40) The courageous juror, Mr. James G. Kiefer, Sr., frankly expressed his confusion in open Court. His earnestness was rewarded not only by aid or enlightenment, but only by the persistent question from the Court:

"Is this your verdict?" (J.A. 34–35)

Subsequently, the sworn statements of other jurors, which are part of appellant's record, confirmed the fact of widespread confusion on the law of contributory negligence as it affected appellant. (J.A. 39, 40).

The failure to give a proper requested instruction is a ground for a new trial. 6 Moore, Federal Practice 59.08(2) at 3778 (1962). Appellant, therefore, urges upon this Court that the District Court's instructions were inadequate and prejudicial to appellant, and that the District Court's denial of appellant's motion for a new trial constituted prejudicial error.

II

The District Court's Denial of Appellant's Motion for a New Trial, With a Record Before the Court of Flagrancy and Irregularity, Was Prejudicial Error and a Clear Abuse of Judicial Discretion.

Appellant, on December 28, 1962, timely filed a motion for a new trial and executed at the same time a motions card requesting an oral hearing on said motion. Appellant's motion was accompanied by a transcript of pertinent sections of the record to support the motion and by a number of sworn statements from jurors relative to the confusion resulting from the instructions. Appellee's opposition was docketed January 10, 1963, which was not timely, and the District Court issued its order January 14, 1963, allowing appellant no opportunity to reply.

Appellant contends that the District Court procedure on appellant's motion was, at the least, arbitrary, and at the worst, prejudicial, to appellant's substantial rights and an abuse of judicial discretion.

Appellant for the purpose of establishing before this Court the flagrancy and irregularity referred to in the caption of this argument, restates and incorporates in Argument II, all that she has stated in Argument I, above, relating to (1) the District Court's failure to instruct on or define appellant's status as a non-owning passenger; (2) the District Court's failure to instruct that the law of contributory negligence was no bar to appellant's right to recovery; (3) the District Court's failure to amplify its instruction upon request of appellant's counsel, although acknowledging that the point would cause the jury trouble; and (4) the District Court's failure to aid a juror when obviously confused at the time of the jury polling. Appellant earnestly contends that such a record entitled her to a full hearing and the opportunity to argue her motion for a new trial.

Appellant submits that the record before the District Court on appellant's motion for a new trial was not a record merely of jurors'

affidavits, but was such a record, as stated above, as to entitle appellant to a new trial even in the absence of the jurors' affidavits. Appellant's cause of action should not be permitted to pass into oblivion, unremedied, on the strength of the outworn and outmoded shibboleth that a "juror's testimony or affidavit is not receivable to impeach his own verdict."

Appellant urges upon this Court the view of the ancient formula taken by Professor Wigmore, who states:

> "But this rule of thumb is in itself neither strictly correct as a statement of the acknowledged law, nor at all defensible upon any principle in this unqualified form. It is a mere shibboleth, and has no intrinsic signification whatever." 8 Wigmore Evidence § 2345 at 633 (1950 ed).

It was upon this mere "shibboleth" that appellee's opposition to appellant's motion for a new trial was based. Appellant urges this Court to reject it.

Appellant maintains that the better view of the rule is that enunciated by Professor Wigmore and adopted by Justice Cardozo who in sanctioning an exception to the rule stated:

> "For the origin of the privilege we are referred to ancient usage, and for its defense to public policy. Freedom of debate might be stifled and independence of thought checked if jurors were made to feel that their arguments and ballots were to be freely published to the world. The force of these considerations is not to be gainsaid. But the recognition of a privilege does not mean that it is without conditions or exceptions. The social policy that will prevail in many situations may run foul in others of a different social policy, competing for supremacy. It is then the function of a court to mediate between them, assigning, so far as possible, a proper value to each, and summoning to its aid all the distinctions and analogies that are the tools of the judicial process." Clark v. U. S., 289 U.S. 1.

The Court's attention is also called to the collection of federal cases permitting exceptions to the inflexibility of the rule against impeachment, gathered by Professor Moore. See 6 Moore, Federal Practice § 59.08(4) at 3796 (1953).

It is appellant's position that the jurors' sworn statements were entitled to consideration. Assuming that the rule against impeachment was determinative of the action taken by the District Court, appellant contends that the record before the Court presented a situation that needed both airing and light. However, even in the absence of the jurors' affidavits, the record was one requiring a new trial to protect appellant's substantial rights.

CONCLUSION

For the foregoing reasons, appellant respectfully submits that she is entitled to a new trial.

Respectfully submitted,

JOSEPH D. BULMAN
SIDNEY M. GOLDSTEIN
ARTHUR S. FELD
JOHN E. KENNAHAN

820 Woodward Building
Washington 5, D. C.

Attorneys for Appellant

INDEX

JOINT APPENDIX

[Filed March 10, 1960]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DOROTHY M. BONES
3818 Beecher St., N. W.
Washington, D. C.

and

BERNARD L. KING
3527 Porter Street, N. W.
Washington, D. C.

and

DOROTHY L. HAYNES
3818 Beecher St., N. W.
Washington, D. C.,

Plaintiffs,

vs.

HELEN I. COOLIDGE
3005 O St., N. W.
Washington, D. C.,

Defendant.

Civil Action No. 712-60

COMPLAINT
(Personal Injuries)
(and Property Damage)

1. This Court has jurisdiction of the within cause of action the amount in controversy exceeding the sum of Three Thousand Dollars ($3,000.00).

2. On, to wit, February 27, 1960, plaintiff, Dorothy M. Bones was operating the vehicle owned by plaintiff, Bernard L. King, in a northerly direction on 29th St., N. W., at or near its intersection with M St., N.W., Washington, D. C. At the time and place aforesaid, defendant, Helen I. Coolidge, was operating her vehicle in an easterly direction on M St. in a careless and negligent manner and in violation of

the traffic rules and regulations then and there in effect in the District of Columbia. As a result of defendant's carelessness and negligence as aforesaid, defendant struck the vehicle operated by plaintiff, Dorothy M. Bones, causing said plaintiff to be thrown in and about the vehicle, and to sustain thereby severe personal injuries.

3. On, to wit, February 27, 1960, plaintiff, Dorothy M. Bones, was operating the vehicle of plaintiff Bernard L. King in a northerly direction on 29th St., N. W., at or near its intersection with M. St., N. W., Washington, D. C. Plaintiff Bernard L. King was a passenger in the said vehicle. At the time and place aforesaid, defendant, Helen I. Coolidge, was operating her vehicle in an easterly direction on M St. in a careless and negligent manner and in violation of the traffic rules and regulations then and there in effect in the District of Columbia. As a result of the defendant's carelessness and negligence as aforesaid, defendant struck the vehicle owned by plaintiff Bernard L. King, causing him to be thrown in and about said vehicle, and to sustain thereby severe personal injuries; said collision also resulted in extensive property damage to said plaintiff's vehicle.

4. On, to wit, February 27, 1960, plaintiff, Dorothy M. Bones was operating the vehicle owned by plaintiff, Bernard L. King, in a northerly direction on 29th St., N. W., at or near its intersection with M St., N. W., Washington, D. C. Plaintiff Dorothy L. Haynes was a passenger in said vehicle. At the time and place aforesaid, defendant, Helen I. Coolidge, was operating her vehicle in an easterly direction on M St. in a careless and negligent manner and in violation of the traffic rules and regulations then and there in effect in the District of Columbia. As a result of the defendant's carelessness and negligence as aforesaid, defendant struck the vehicle owned by plaintiff Bernard L. King, causing plaintiff Dorothy L. Haynes to be thrown in and about said vehicle, and to sustain thereby severe personal injuries.

5. As a result of the negligence of the defendant as aforesaid, plaintiff, Dorothy M. Bones, sustained severe, permanent and painful

injuries, in and about the head, body and limbs; mental anguish and nervous shock; has suffered, and will continue to suffer, great physical pain; has expended, and will continue to expend, great sums of money for hospital and medical care and associated items; and was rendered unable to pursue her usual gainful occupation and normal activities.

6. As a result of the negligence of the defendant as aforesaid, plaintiff, Bernard L. King, sustained severe, permanent and painful injuries, in and about the head, body and limbs; mental anguish and nervous shock; has suffered, and will continue to suffer, great physical pain; has expended, and will continue to expend, great sums of money for hospital and medical care and associated items; and was rendered unable to pursue his usual gainful occupation and normal activities; and sustained extensive property damage.

7. As a result of the negligence of the defendant as aforesaid, plaintiff, Dorothy L. Haynes, sustained severe, permanent and painful injuries, in and about the head, body and limbs; mental anguish and nervous shock; has suffered, and will continue to suffer, great physical pain; has expended, and will continue to expend, great sums of money for hospital and medical care and associated items; and was rendered unable to pursue his usual gainful occupation and normal activities.

WHEREFORE, the plaintiff, Dorothy M. Bones, demands judgment against the defendant, Helen I. Coolidge, in the sum of Seven Thousand Five Hundred Dollars ($7500.00), and

WHEREFORE, the plaintiff, Bernard L. King, demands judgment against the defendant, Helen I. Coolidge, in the sum of Three Thousand Five Hundred Dollars ($3500.00), and

WHEREFORE, the plaintiff, Dorothy L. Haynes, demands judgment against the defendant, Helen I. Coolidge, in the sum of Fifteen Thousand Dollars ($15,000.00), besides interest and costs.

/s/ Joseph D. Bulman
/s/ Arthur S. Feld
/s/ Sidney M. Goldstein
/s/ John E. Kennahan
Attorneys for Plaintiffs

* * *

The plaintiffs demand trial by jury.

/s/ John E. Kennahan

[Filed Oct. 14, 1960]

ANSWER TO COMPLAINT

First Defense

The defendant admits that on February 27, 1960 there was an accident within the intersection of 29th and M Streets, N. W., in the District of Columbia between an automobile being operated by the defendant and an automobile owned by the plaintiff Bernard L. King, being operated by the permissive agent of the plaintiff King, the plaintiff Dorothy M. Bones, in which the plaintiff Dorothy L. Haynes was riding as a passenger. Defendant has no knowledge nor information sufficient to form a belief as to the allegations of injuries and damages contained in the complaint. The remaining allegations of the complaint are denied.

Second Defense

The accident was caused or contributed to by negligence and violation of motor vehicle regulations in the operation of the automobile owned by the plaintiff Bernard L. King and being operated by his permissive agent, the plaintiff Dorothy M. Bones.

HOGAN & HARTSON

By /s/ Frank F. Roberson

* * *

Attorneys for Defendant

[Certificate of Service]

[Filed May 8, 1962]

PLAINTIFFS' PRETRIAL STATEMENT

OCCURRENCE:

On February 27, 1960, plaintiff, Dorothy M. Bones, was operating an automobile owned by the plaintiff, Bernard L. King, in a northerly direction on 29th Street, N.W., at or near its intersection with M Street,

N.W., Washington, D. C. At the same time and place, defendant, Helen I. Coolidge was operating her vehicle in an easterly direction on M Street, at or near its intersection with 29th Street, N. W., and collided with the vehicle operated by plaintiff, Dorothy M. Bones, in which plaintiffs Bernard L. King and Dorothy L. Haynes were passengers.

LIABILITY:

Failure to keep vehicle under control so as to avoid colliding. (Sec. 22a).
Failure to keep vehicle at that speed which was reasonable and prudent under the circumstances. (Sec. 22c).
Failure to yield right of way. (Sec. 46).
Disregard of stop sign and failure to come to a complete stop. (Sec.48).
Failure to warn by sounding the horn. (Sec. 54).
Failure to give full time and attention. (Sec. 99c).
Disregard of traffic control signal. (Sec. 11).
Failure to keep proper lookout and failure to exercise due care.
Failure to operate at reduced speed with respect to conditions existing.
Failure to slow at approach to intersection.
Reckless driving.

INJURIES:
(Dorothy Haynes)

Fracture of nasal bones, bridge swollen and tender.
Fracture of incisal edges of teeth with sensitivity to palpation and heat change.
Multiple contusions: forehead, both knees, left shoulder.
Sub-conjunctival hemorrhage, left.
Swellings: forehead, left eye swollen shut.
Post-traumatic headaches, dizziness, nervousness.
Pain and suffering; discoloration and hematoma formations.

Permanent:

Scar tissue; discoloration, tenderness over left supraorbital branch of 5th nerve.

SPECIALS:
(Dorothy Haynes)

Dr. Schuster	$ 85.00
Dr. Cox	25.00
Dr. Yuhaniak	17.00
Dr. Horwitz	105.00
Dr. Jacobson	190.00
George Washington University Hospital	334.00
Medication	10.10
Transportation	15.00
Loss of Earnings	185.00
	$ 966.10

INJURIES:
(Dorothy Bones)

Severely contused spleen.

Bruises, left knee and leg, ecchymosis.

Black right eye, ecchymosis.

Bruises of abdominal wall.

Permanent:

None.

SPECIALS:
(Dorothy Bones)

Dr. McCune	$ 20.00
Dr. James Feffer	43.00
Dr. MacDonald (x-rays)	15.00
Drs. Lindsay, Rice and Salinger	3.00
George Washington University Hospital	10.00
Transportation	10.00
Loss of Earnings	140.00
	$ 241.00

INJURIES:
(Bernard L. King)

Acute strain of cervical spine.

Multiple contusions and abrasions (right foreleg, left hand and forehead)

Sprain of left hand.

SPECIALS:
(Bernard L. King)

Dr. Jacobson	$ 25.00
Dr. Henry Feffer	70.00
George Washington University Hospital	5.50
Transportation	20.00
Loss of Earnings	36.64
Property Damage	50.00
	$ 207.14

STIPULATIONS:

Traffic Rules and Regulations of the District of Columbia.

Hospital reports and bills.

X-ray plates.

Amounts claimed on loss of earnings.

Exchange of witnesses.

Joseph D. Bulman

John E. Kennahan
Attorneys for Plaintiffs
* * *

[Certificate of Service]

[Filed May 8, 1962]

DEFENDANT'S PRETRIAL STATEMENT

Defendant admits that on February 27, 1960, a collision occurred at approximately 4:30 p.m. in the intersection of 29th and "M" Streets, N.W., between a vehicle owned and operated by her and a vehicle owned by the plaintiff Bernard King and operated by his permissive user Dorothy Bones. Defendant denies negligence and asserts the sole or contributory negligence of the operator, Dorothy Bones, which is attributable to the owner Bernard King so as to bar their claims in that the operator was proceeding at an unreasonable speed, failed to keep a proper lookout, failed to give full time and attention to the operation of Bernard King's vehicle, failed to look or look effectively to see what there was to be seen and failed to slow for an intersection. She also violated the following traffic regulations: SS 22a, 22b, 22c, and 99c.

Requested Stipulations

1. Physical examination of Dorothy Haynes and any other plaintiff claiming permanent injury.
2. Income tax returnes of Dorothy Haynes for 1959, 1960, and 1961.
3. Exchange of medical reports.
4. Exchange of witnesses.

HOGAN & HARTSON

By David N. Webster
Attorneys for Defendant

* * *

[Certificate of Service]

[Filed May 10, 1962]

PRETRIAL PROCEEDINGS

Tort for personal injuries.

THE PARTIES AGREE TO THE FOLLOWING STATEMENT OF FACTS AND STIPULATE THERETO:

On Feb. 27, 1960, at approximately 4:30 P.M., the P, Dorothy M.

Bones, then age 20, was operating an automobile owned by P Bernard L. King, then age 24, in a northerly direction on 29th St., N.W., Washington, D. C. At the same time the D was operating her vehicle east on M Street. The vehicles collided at the intersection of the 2 streets. P King and the P, Dorothy L. Haynes, then age 42, were in the vehicle operated by Bones. The intersection in question was controlled by traffic signals which were operating at the time. Roads dry, weather clear.

PLAINTIFFS claim that the D's vehicle ran thru a red traffic signal and that the accident, their injuries and damages were caused by the negligence of and violations of D. C. Traffic Regulations by the D and her reckless driving as follows: failure to keep vehicle under control so as to avoid colliding, Sec. 22a; failure to keep vehicle at that speed which was reasonable and prudent under the circumstances, Sec. 22c; failure to yield the right of way, Sec. 46; disregard of stop sign and failure to come to a complete stop, Sec. 48; failure to give full time and attention, Sec. 99c; disregard of traffic control signal, Sec. 11; failure to keep proper lookout; failure to operate at reduced speed with respect to conditions existing; failure to slow at approach to intersection.

DEFENDANT denies negligence and denies violations of D. C. Traffic Regulations; asserts the sole or contributory negligence of the operator, Dorothy Bones, which is attributable to the owner, Bernard King, who was a passenger in the car barrs their claims in that the operator was proceeding at an unreasonable speed, failed to keep a proper lookout; failed to give full time and attention to the operation of King's vehicle; failed to look or look effectively to see what was there to be seen and failed to slow for an intersection. She also violated the following DC Traffic Regulations, Secs, 22a, b, c, and Sec. 99c.

INJURIES:

Dorothy Haynes - fracture of nasal bones, bridge swollen and tender. Fracture of incisal edges of teeth with sensitivity to palpation and heat change. Multiple contusions: forehead, both knees, left shoulder. Sub-conjunctival hemorrhage, left. Swellings: forehead, left eye swollen shut. Post-traumatic headaches, dizziness, nervousness. Pain and suffering; discoloration and hematoma formations.

Permanent: Scar tissue; discoloration, tenderness over left supraorbital branch of 5th nerve.

SPECIALS: Dorothy Haynes

Dr. Schuster, $85.00; Dr. Cox, $25.00; Dr. Yuhaniak, $17.00; Dr. Horwitz, $105.00; Dr. Jacobson, $190.00; George Washington University Hospital, $334.00; Medication, $10.10; transportation, $15.00; loss of earnings, $185.00. Total, $966.10.

INJURIES:

Dorothy Bones - severely contused spleen; bruises, left knee and leg, ecchymosis. Black right eye, ecchymosis. Bruises of abdominal wall.

Permanent - None.

SPECIALS - Dorothy Bones

Dr. McCune, $20.00; Dr. James Feffer, $43.00; Dr. MacDonald (x-rays), $15.00; Drs. Lindsay, Rice and Salinger, $3.00; George Washington University Hospital, $10.00; transportation, $10.00; loss of earnings, $140.00. Total, $241.00

INJURIES:

Bernard L. King - Acute strain of cervical spine. Multiple contusions and abrasions (right foreleg, left hand and forehead). Sprain of left hand. No permanent injury.

SPECIALS - Bernard L. King

Dr. Jacobson, $25.00; Dr. Henry Feffer, $70.00; George Washington University Hospital, $5.50; transportation, $20.00; loss of earnings, $36.64; Property damage, $50.00. Total $207.14.

NOTE: Plaintiffs' counsel asserts permanent injuries to P Haynes. One medical report in his possession seems to indicate a scar on her face but with reference to this, and the other allegations of permanent injury, P at the time of pretrial, had no unequivocal written medical statement to sustain these claims.

STIPULATIONS

The following may be admitted in evidence without formal proof, subject to all proper legal objections: DC Traffic Regulations listed herein; x-ray plates; hospital records; hospital bills, initialled by Examiner; physician and dentist bills, initialled by Examiner; photographs, initialled by Examiner.

The parties agree to the mutual exchange of all medical reports of examining or treating physicians, now in hand, on or before May 28, 1962, and a similar exchange of all other such reports within 48 hours of the alert of this case for trial.

Counsel for Ps agrees to make the P, Dorothy Haynes, available for the purpose of a physical examination by physician of D's choice before, but not to interfere with, trial.

The parties agree to file with the Clerk of the Court and to the mutual exchange of, on or before May 28, 1962, a list of the name(s) and address(es) of witnesses to the accident, to the circumstances surrounding same, and with reference to the nature and extent of injuries and damage.

P has other bills marked P-1 thru P-3 and photograph marked P-4, which he requests be admitted in evidence but D refuses to make any agreement with reference thereto.

Counsel for the Ps shall furnish to counsel for D a written authorization which will be supplied by D within 5 days, and returned to D on or before May 28, 1962, which will enable D to obtain copies of the Federal income tax return for the years 1959, 1960, 1961.

TRIAL COUNSEL: John E. Kennahan, Esq. for the Plaintiffs; Francis L. Casey, Jr., Esq. for the Defendant.

The Examiner has requested counsel for D to appear at trial with the maximum amount of authority to settle this case which will be allowed him by his principal.

Counsel for the Ps desires to take the deposition of the D, who has been out of the country. This may be done provided there is no delay in the trial caused thereby.

P requests D to stipulate to the loss of earnings claimed by each P but D refuses.

/s/ John E. Kennahan
Counsel for Plaintiffs

/s/ David N. Webster
Counsel for Defendant

/s/ John J. Finn
PRETRIAL EXAMINER

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS

1

Washington, D.C.
Wednesday, Dec. 19, 1962

The above-entitled matter came on for further trial before the HONORABLE EDWARD A. TAMM, Judge, United States District Court for the District of Columbia, and a jury at 10:00 a.m.

* * * * *

2

CHARGE TO THE JURY

THE COURT: Ladies and gentlemen of the jury, we have reached the point in the trial of this case when it becomes the Court's responsibility to instruct you as to the law that will govern you in reaching your verdict in this case and it is, of course, your responsibility to accept the law as it is outlined to you by the Court.

As you know, under our system of jurisprudence, we actually have two judges or groups of judges in the courtroom. The Court is required to pass upon and rule upon and make findings on the questions of law, and the jury is required to make findings on all questions of fact.

In our beautiful courthouse, we are the frequent recipients of visitors from foreign countries who come to study our judicial system. Except for the people who come from the English speaking countries, we observe that the jurists and the lawyers from the rest of the world are never able to understand the function of a jury in either a civil or criminal case. We have great difficulty in explaining to them just how the jury operates and what their function is and, ultimately, we get down to the illustration that I have just given you, that the jury is the judge of the facts.

3

This, then, defines your responsibility in this trial. It is for you to determine, within the framework of the Court's instructions, what facts have been established by the evidence and then to apply the law as the Court defines it to you to those facts.

The same high standard of objectivity is expected of you as

jurors that is expected of the Court. In other words, you will weigh the evidence which has been presented here without bias, without prejudice or without favor towards one side or the other.

I repeat, you are the exclusive judges of the facts. In this regard I caution you that the closing arguments made by these attorneys yesterday afternoon do not constitute evidence in the case. Obviously, the closing statements are efforts on the part of these advocates to present their version of the evidence in the light that is most favorable to the client that they represent. Remember, then, that the attorneys' recollections of the evidence are not binding upon you nor is the Court's recollection of the evidence, if I have any occasion to refer to any of the evidence, binding upon you because it is your recollection of the evidence which must govern you in reaching your verdict in the case.

4 As jurors you are the sole judges of the credibility of the witnesses. This means, of course, that you must determine in this case which of these witnesses you are going to believe and to what extent you are going to believe them.

In passing upon the credibility of the witnesses, you have the right to consider the demeanor of each witness on the witness stand, his or her manner of testifying. You may consider whether the witness impresses you as having an accurate memory and recollection of the facts about which the witness is testifying. You may consider whether the witness displays any apparent favor or prejudice towards one side or the other and, of course, you must also consider whether the witness has any interest in the outcome of the case.

In a case of this kind, I think the principal problem for a jury is to pass upon the credibility of the witnesses. It is I think your major problem in this case in your discussions in the jury room to determine who is telling the truth and I think after that, the rest of your functioning should be relatively easy. This matter, then, of the credibility of the witnesses is entirely within your hands.

You have a right to draw upon all of the past experiences of your own
5 lives, upon all of the accumulated wisdom that you have acquired in dealing with people from day to day, and to apply to the testimony of each of these witnesses those standards which you have found reliable in making your day-to-day determinations as to whether people are telling the truth or are telling a falsehood.

If you believe that any witness willfully testified falsely as to any material fact concerning which that witness could not possibly be mistaken, you are then at liberty if you deem it desirable to do so to disregard the entire testimony of that witness or any part of the testimony of that witness.

I repeat, I think your major problem, your first determination must be to evaluate the credibility of these witnesses. In this respect, I have always complete confidence in the ability of the jury to determine who is telling the whole truth and who is shading the truth. I don't think that a witness has ever taken the stand in my courtroom that could fool twelve jurors. Consequently, I have the utmost confidence in your ability collectively to determine who is telling the truth in a case of this kind because I think the truth is so obvious that it is readily recognized by jurors.

In the course of this trial, the Court has had occasion to reject certain evidence. The Court has had occasion to sustain objections to
6 some evidence. You will not consider as evidence anything which the Court has rejected. Whenever the Court sustains an objection to a question, that eliminates that question from your consideration.

Your duty, then, becomes to resolve the conflicts of evidence in this case.

The burden of proof is upon these plaintiffs to sustain their aspects of the case by what we call a fair preponderance of the evidence. What does this mean?

The term "preponderance of the evidence" means such evidence as when weighed with that opposed to it, has the more convincing force.

If any of you have participated in criminal trials this month, you have heard the Judge tell you that the burden of proof is upon the Government to prove the defendant guilty beyond a reasonable doubt. This means that in criminal cases, the Government has a very heavy burden to prove guilt beyond a reasonable doubt. In civil cases, that is, cases where private parties are in litigation with each other, the burden of proof is not as heavy as in criminal cases. The burden of proof is upon the plaintiffs to sustain their aspects of the case by a fair preponderance of the evidence.

In the hope that no other Judge this month has illustrated this term rather than defined it to you, I am going to try by illustration to explain

7 the significance of this term "preponderance of the evidence":

Imagine, if you will, when you go into the jury room that you have on that handsome walnut table an apothecary scale. An apothecary scale is a scale in which two trays are suspended from a bar. The trays hang in equal balance. In the jury room label the right-hand tray the plaintiffs' tray, label the left-hand tray the defendant's tray. Place in the right-hand tray all of the evidence in the case that favors the plaintiffs' side of the case and give to that evidence the weight that you believe it should receive. Place in the left-hand tray, the defendant's tray, all of the evidence that favors the defendant's side of the case, again giving the evidence the weight that it should receive in your opinion.

If the right-hand tray goes down, that is, if the plaintiffs' evidence outweighs the defendant's evidence, then your verdict should be for the plaintiffs because the plaintiffs' evidence outweighs the defendant's evidence. On the other hand, if the left-hand tray goes down, if the defendant's evidence outweighs the plaintiffs' evidence, then your verdict should be for the defendant. If, however, the third possibility occurs, that is, if with all of the evidence in the case divided between the trays, the trays remain in equal balance, then your verdict must

8 be for the defendant because the plaintiffs have not proved their

case by a preponderance of the evidence.

A party has succeeded in carrying the burden of proof on an issue of fact if the evidence favoring his or her side of the question is more convincing than that tending to support the contrary side and if it causes you, the jurors, to believe that on that issue the probability of truth favors that party.

The burden of proof, then, is upon these plaintiffs to prove by a preponderance of the evidence that the defendant was negligent and that such negligence was the proximate cause of the injury to the plaintiffs.

The law does not permit you to guess or speculate as to the cause of this accident. You must base your findings solely upon the evidence that has been adduced before you and upon any inferences reasonably deductible therefrom. If the evidence is equally balanced on the issue of negligence or proximate cause so that it does not preponderate in favor of the party making the charge in the basic case, that is, the plaintiffs, of course then the plaintiffs have failed to fulfill their burden of proof.

I have several times in the course of these instructions to you used the word "negligence." Naturally, the question comes to mind,

9 What is negligence?

Negligence is the doing of some act which a reasonably prudent person would not do or the failure to do something which a reasonably prudent person would do, actuated by those considerations which ordinarily regulate the conduct of human affairs. Negligence is the failure to use ordinary care in the management of one's property or of one's person.

This term "negligence", however, is a relative term; it is never an absolute one. In other words, the question of negligence must be considered in the light of all of the circumstances in the individual case. What is negligence under one set of conditions might not be negligence under another set of conditions.

The standard of conduct, the standard of behavior, that the law requires of all of us is the standard of the man of ordinary prudence. None of us are expected or required to conduct ourselves according to the standard of an extraordinarily conscientious or a very intelligent person but rather the law extracts and requires from us the conduct which I have defined to you, the standard of conduct of a man of ordinary prudence under the same or similar circumstances.

I have used the phrase "proximate cause" in the course of these
10 instructions to you. What do these words mean? The proximate cause of an injury is that cause which in actual and continuous sequence unbroken by any efficient intervening cause produces the injury, and without which the result would not have occurred. The proximate cause of an injury is the efficient cause, the one that necessarily sets in operation the factors that cause the injury.

Both negligence and proximate cause, as I have defined them to you, are requisites for finding liability. The mere fact that an accident happened, considered alone and by itself, does not support an inference that some party or any party to the accident was negligent. No presumption of negligence whatever arises from the mere happening of an accident. On the contrary, the legal presumption is that legal care was exercised by all parties to the accident. The burden of proof is upon the plaintiffs to overcome this presumption of due care on the part of the defendant and to prove by a preponderance of the evidence that the defendant was negligent and that such negligence was the proximate cause of the accident.

There is in this case, in addition to the charge of negligence made by these plaintiffs against the defendant, a counter-charge in which the defendant charges the plaintiff driver of the car with contributory negligence. What, then, is the definition of contributory negligence?

11 Contributory negligence is negligence on the part of the person complaining, that is, the plaintiffs or a plaintiff, which combining in some degree with the negligence of another helps in proximately causing the injury of which the plaintiff complains.

If you find that the plaintiff Dorothy M. Bones was guilty of contributory negligence, you should find for the defendant as between Dorothy M. Bones and the defendant and also for the defendant as to the plaintiff Bernard L. King for reasons which I will explain to you in a few minutes, because one who is guilty of contributory negligence may not recover from another for the injuries sustained.

To repeat this point, a person who is guilty of contributory negligence, that is, a person whose negligence contributes in any degree to the causing of an accident, may not recover from any other person who was negligent in that accident. This is the doctrine of contributory negligence recognized as the law in this jurisdiction.

We have another doctrine in some of the states of our Union which is defined as the doctrine of comparative negligence. Under this doctrine, the jury is required to compare the degree of negligence of several persons involved in an accident in which two or more were negligent to determine the degree of negligence on the part of each of

12 the parties and to award a verdict for a percentage of the injury to the person who was the least negligent in the accident. I do not know how a jury without the aid of a computer, a very large electric computer, can resolve the evidence into these mathematical formulae that are required under the doctrine of comparative negligence. Probably that is the basic reason that we do not recognize that doctrine in this jurisdiction. We adhere to the doctrine of contributory negligence which I have defined to you.

The burden of proof to prove contributory negligence is, of course, upon the defendant under the requirements for burden of proof that I have previously outlined to you.

You are instructed that you may not guess or speculate as to the existence of any fact in this case. You must base your findings, as I have said, solely upon the evidence that has been adduced before you and upon any inferences reasonably deducible therefrom.

In determining whether negligence or contributory negligence and

proximate cause have been proved by a preponderance of the evidence, you should consider all of the evidence bearing upon the question regardless of which side produced the evidence. In other words,

13 evidence in the case is evidence for and against all of the parties to the case. A party is entitled to the same benefit from the evidence that favors him when produced by his adversary as when produced by himself.

With regard to the testimony of the witnesses, I must point out to you again that you evaluate the testimony without bias, favor or prejudice towards one side or the other. You must weigh the evidence in the case. In other words, you cannot arrive at a verdict in this or any other case by counting the number of witnesses on each side and awarding your verdict to the side that produces the most witnesses. If the Court permitted this procedure, I am sure that you can recognize that the ingenuity of attorneys would fill our witness rooms with such a number of witnesses that the Court would spend most of his life trying the same case. You don't count the witnesses, rather you weigh the testimony of the witnesses.

You are instructed that the testimony of one witness entitled to full credit is sufficient for the proof of any fact and may justify a verdict even if a number of witnesses have testified to the contrary if upon the whole case and considering the credibility of the witnesses, as I have defined that term to you, you should determine that the prob-

14 ability of truth favors the testimony of that one witness.

The Court has admitted into evidence several traffic regulations which have been read to you by the attorneys, either as evidence in presenting their case or as a part of their closing arguments. You are instructed that a violation of any traffic regulation constitutes negligence as a matter of law. Violation of a traffic regulation, even though it constitutes negligence as a matter of law, is only of significance in a case if the violation was a proximate cause of the injury of which the complaint is made.

Every person using a public highway must exercise ordinary care at all times to avoid colliding with other persons who are also using the highway and to avoid placing himself or others in danger; and while he may assume that others will exercise due care and obey the law, he may not for that reason fail to exercise ordinary caution on his own part.

You are further instructed that with respect to the issue of negligence of a party failing to yield the right-of-way, such right-of-way is not absolute and you must take into consideration not only the question of who had the technical right-of-way but also the distance of the various vehicles from the intersection, their respective speeds and other prevailing traffic conditions.

You are further instructed that the fact that one party has the technical right-of-way does not excuse him or her from the exercise of ordinary care to avoid injuring others.

You are instructed that when a person is using or is about to use a street or a highway, either as a pedestrian or as an operator of a motor vehicle, he has a duty to make reasonable observations as to traffic and other conditions which confront him in order to protect himself and others while using the roadway. What observations he should make and what he should do for his own safety are matters which the law does not attempt to regulate in detail except that it does place upon every person the continuing duty to exercise ordinary care to avoid an accident.

The fact that one who has a duty to look testifies that he or she did look but did not see that which was plainly there to be seen is of no legal significance, for one who looks ineffectually is as careless as one who does not look at all and such conduct on his or her part constitutes negligence.

The law requires the operator of a motor vehicle to keep a proper lookout in order that he may avail himself of what the lookout discloses in order to prevent injury to himself or others, which requirement

imposed by law is to look effectively. One who looks and does not see that which is plainly there to be seen is, I repeat, as negligent as one who does not look at all.

To return for a moment to this matter of contributory negligence, you are instructed that because the plaintiff Miss Bones was driving an automobile owned by the plaintiff Mr. King with his permission, she was by law his agent while driving the car and, therefore, any negligence or contributory negligence on her part must be imputed to him if you find her guilty of contributory negligence. For that reason, you must find for the defendant against the plaintiffs Bones and King in the event that you find that any negligence on the part of Miss Bones was one of the proximate causes of the collision.

This is a general statement of the law of agency insofar as it applies to the operation of automobiles in the District of Columbia. We have a statute which says very concisely and very explicitly that anyone who operates an automobile with the permission of the owner is for legal purposes the agent of the owner and, consequently, the neg-
17 ligence of the driver of the automobile may be charged and is charged by law to the owner of the automobile.

We come now to the question of the measure of damages in this case. If under the Court's instructions you find that the plaintiffs are entitled to a verdict, you will consider in fixing the amount of your verdict for each plaintiff the elements of damage which I will now enumerate to you:

First, the reasonable value not exceeding the cost to each plaintiff of the examinations, tests, attention and care by physicians and surgeons reasonably required and actually given in the treatment of these plaintiffs. You will also award such sums not exceeding the cost to the plaintiffs of the hospital accommodations and care, the ambulance service reasonably required and actually given in the treatment of these plaintiffs. In addition if under the Court's instructions you find the plaintiffs are entitled to a verdict, you will in addition award to each

of them that you find suffering from these elements such sum as will reasonably compensate them for the pain, discomfort and mental anguish suffered by them which under the evidence was shown to have been suffered by them as a proximate result of the injury in question.

18 In the case of the plaintiff Dorothy L. Haynes, you may in addition consider any future discomfort, mental anguish or pain which you find established by the evidence as being in the nature of a permanent injury in this case.

In addition, you will award to these plaintiffs if you find in their behalf the reasonable value of the time lost by them because of their injury wherein they were unable to pursue their usual occupation. In determining this amount, you should consider the evidence of the plaintiffs' individual earning capacity, the rate of pay, and determine what they were reasonably certain to have earned in the time lost had they not been disabled.

In his closing argument yesterday, Mr. Casey referred to the fact that the plaintiff Dorothy M. Bones was on sick leave and indicated that there was some compensation for her being on sick leave. This is not a factor which influences the question of damages in a civil case. The fact that a person is on compensation from any source while he is absent from his employment because of an injury is not a factor in mitigation of damages. The law says that if a defendant by negligence causes an accident and the plaintiff's employer is generous enough to provide compensation while the person is off from work, the defendant is not entitled to any bonus for that type of compensation. Consequently,

19 the fact that compensation is paid during sick leave is not a factor in mitigation of damages in a case of this kind.

In addition with reference to the plaintiff Dorothy L. Haynes, you will consider if you find in favor of this plaintiff such sum as will reasonably compensate her for any loss of earning power occasioned by the injury in question from which you find under the evidence she is reasonably certain to suffer.

With reference to the plaintiff Bernard L. King, you will if you find in his behalf award him such sum as will reasonably compensate him for the damage to his property, that is, the damage done to his automobile as a result of this accident.

You are instructed that the plaintiffs bear the burden of proof on all damage and injury issues in this case. This means that in order for you to compensate any of them for an injury, you must find that they have established by a fair preponderance of the evidence that they suffered the injury for which they claim compensation and that the injury was proximately caused by the accident. If you find that the evidence supports only the conclusion that the injury was possibly suffered or that it was only possibly the result of the accident, you

20 cannot award compensation for the claim of injury. This is so because the plaintiffs' burden of proof on such issue requires that they establish that the injury was probably the result of the accident.

For this reason, the testimony of a physician that a plaintiff may possibly have suffered an injury fails to satisfy the plaintiff's burden of proof on the issue of that injury. In order for a physician's testimony to satisfy the burden of proof on the issue of that injury, he must at least testify that as a matter of reasonable medical probability the injury was suffered by that plaintiff.

If you find for these plaintiffs or any of these plaintiffs, the amount of your verdict is left to your sound discretion but your award must be just and reasonable and must be based upon the evidence introduced.

Your verdict in this case, of course, must be a unanimous one which means that all twelve of you must concur in your verdict.

I have instructed you on the subject of the measure of damages in this case because it is my duty to instruct you as to all the law that may become pertinent in your deliberations. I, of course, do not know whether you will need the instructions on damages and the fact that I have given them to you must not be considered as intimating any

21 view of my own on the issue of liability or as to which party is entitled to your verdict.

In the course of instructions of this kind to the jury, it is unavoidable that certain points are repeated. If in the course of these instructions then, any rule, direction or idea has been stated by me in varying ways, no emphasis thereon is intended by me and none must be inferred by you. For that reason, you should not single out any certain sentence or any individual point or instruction and ignore the others, but you are to consider all of the instructions as a whole and to regard each in the light of all of the others.

The Court has admitted in evidence a number of papers and photographs. Anything which has been admitted in evidence is available for your examination in the jury room if you desire to see it. If, consequently, you want to see any of these exhibits, you have but to request the marshal who is in attendance at the jury room door for the exhibits and they will be sent in to you.

This has been a relatively short trial; the objections have been minimal; the Court's rulings on objections and evidence have been relatively few. I tell you this to caution you that you should not attempt to interpret any of the Court's rulings as to legal questions involving
22 evidence or the presentation of the case as indicating that the Court favors one side or the other in the case.

I have been told by friends who have served on juries in the past that occasionally a juror with a mathematical bent, or possibly a sports fan, has kept a box score of the Court's rulings for or against one side or the other in the case and has announced in the jury room that the judge thinks the verdict should be in favor of this party because he ruled twelve times in favor of one party and only six times in favor of the other. Obviously, in ruling upon objections to evidence and questions and upon other legal matters, the Court does so to the best of the Court's ability in accord with the rules that prevail regulating the conduct of trials. In doing so the Court has no intention, desire or inclination to indicate any favor towards one side or the other.

I express this word of caution in order to emphasize the fact that

I have not expressed nor intended to express, nor have I intimated or intended to intimate any opinion of my own as to what witnesses are or are not worthy of belief, what facts have or have not been established by the evidence, or what inferences should be drawn from the evidence. The Court endeavors religiously to avoid indicating any favor
23 or prejudice towards one side or the other in any case. This Court endeavors in its charge to the jury to refrain from any specific reference to items of evidence or as to any individual witnesses upon the witness stand.

As you may or may not know, we Judges of the Federal Courts have the right in our closing instructions to the jury to tell the jury our own impressions of the case. I have the right, if I see fit to exercise it, to tell you which witnesses I believe, which witnesses if any I don't believe and why I don't believe them. I have the right to tell you what facts I believe the evidence has established or what facts have not been established. I have the right to comment upon the entire case from the Court's viewpoint, subject only to the magic qualification that in expressing my views I say to you, "Of course, you must not be influenced by what I say about the case." I have said to other juries in the past that I have never been able to understand why a Judge would take the jury's time to tell them his own impressions of the case if he didn't at least hope that in spite of what he said, they would be influenced by what he said about the case.

But in this case, I repeat, the Court has not intended by any inference to indicate any views as to which party should prevail in the lawsuit.

24 I want to speak just a word of caution about the conduct of jurors upon entering the jury room. It is most unwise for a juror immediately upon entering the jury room to announce in a loud clear voice that he or she will stand for only one verdict in the case. If a juror takes that position at the very outset of deliberations in a case, his or her pride may cause him reluctantly to maintain that position even though

the discussion in the jury room may convince him that he was mistaken when he took that position.

Each of you must decide this case in accord with the dictates of your own conscience. Your verdict must be one that you can justify to yourselves for the rest of your lives. I believe that for all of you people, this is the last case in which you will participate this month. Undoubtedly, for some of you, it is the last case in which you will participate as jurors in the course of your lifetime. I am sure that this case will remain in your memories for a long time. Your verdict, in the final analysis, must be one that you can justify to your own conscience tomorrow and a year from now.

With this in mind, you should enter the jury room with the desire to listen to the arguments of your fellow jurors with a willingness to be convinced. If some point in the evidence has made no impression whatsoever upon you and yet has made a weighty impression upon other jurors, you should consider that point of evidence very carefully and ask yourself, "Why didn't this point impress me when it impressed all of these other jurors who are equally intelligent and equally honest with myself?" You should not vote upon any question put to you by your foreman in a particular way merely because a majority of the other jurors are voting that way. You must make up your own mind as to the factual situation in the case. You should try to reach a unanimous verdict in the case but, individually, you should do so only if you can justify your position to your own conscience.

To each of you, I say you must make up your own mind as to your verdict in the case but you should not do so until you have listened with a willingness to be convinced to the arguments advocated by other jurors in the jury room.

The Court has spent 45 minutes in defining various terms of law, various requirements of the law in an effort to assist you in reaching a verdict in this case. As a practical matter, how can you go about applying this 45-minute instruction to the facts in this case? I would

suggest that, under your foreman's direction, you carry out a series of questions to yourselves somewhat like the following outline:

Ask yourselves first: Was the defendant negligent? If your answer to this question is no, you find for the defendant and that is the end of

26 your responsibility. If however you answer this question yes, the defendant was negligent, then you ask yourselves a second question: Was the defendant's negligence the proximate cause of the injury to the plaintiffs? If your answer to this question is no, then your verdict is for the defendant. If your answer to this question is yes, then you go to the third question: Was the plaintiff Dorothy M. Bones guilty of contributory negligence? If your answer to this question is yes, then you find for the defendant against the plaintiffs Bones and King and go to the question of damages as to the plaintiff Haynes. If your answer to this question is no, that is, the plaintiff Dorothy M. Bones was not guilty of contributory negligence, then you go to the question of damages as to all of the plaintiffs.

In this case, for the purposes of your verdict, you have actually three cases. We have three plaintiffs, each suing one defendant.

When you return to the courtroom, the procedure will be substantially as follows: The Clerk will address your foreman and say, Mr. Foreman or Madam Foreman, in the case of Dorothy M. Bones, do you find for the plaintiff Bones or for the defendant Coolidge? If your foreman answers, For the defendant Coolidge, that finishes that plaintiff. If your foreman answers, For the plaintiff, the Clerk

27 will then say, In what amount? And your foreman will announce the amount of your verdict for the plaintiff Bones.

The Clerk then asks your foreman, In the case of Bernard L. King, do you find for the plaintiff King or for the defendant Coolidge? If you find for the defendant Coolidge, that ends that inquiry. If your foreman says, We find for the plaintiff King, the Clerk asks, In what amount?

The Clerk will then ask, In the case of the plaintiff Haynes against

the defendant Coolidge, do you find for the plaintiff or for the defendant? If your answer is for the plaintiff, the Clerk again asks, In what amount?

In other words, you will return a separate verdict with reference to each of the three plaintiffs as against the defendant.

The amount of your verdict, I repeat, is left to your sound discretion. If you find in favor of any plaintiff, your verdict is in a single sum, that is, a single amount. You do not allocate a certain amount for medical bills, a certain amount for pain and suffering, or a certain amount for property damage in the case of the plaintiff King but rather your verdict, if you find for any plaintiff, is in one single amount.

Will counsel approach the Bench.

28 (At the Bench)

THE COURT: I will assume for the record that counsel for both the plaintiffs and the defendant renew any objections offered to prayers previously requested by opposing counsel and granted by the Court; and that counsel at this time again request any prayers previously requested and denied by the Court, and renew any objections made thereto.

Does the plaintiff request any further charge?

MR. KENNAHAN: Yes, Your Honor. Yesterday when we were discussing instructions on the matter of damages, I requested that the amount of the ad damnum clause be read into the Court's charge, that I accepted the standard instruction on damages subject to that reservation indicating to the jury merely that that was the upper limit. My recollection of the proceeding yesterday is that Mr. Casey opposed this charge but the Court granted it.

THE COURT: The Court denied it.

MR. KENNAHAN: The Court denied it?

THE COURT: Period.

The Court has renewed your objection to the Court's action on the record.

Do you request any further charge?

MR. KENNAHAN: The only item that I think probably is not clear is this: It has been made quite clear that if there is a finding against
29 Miss Bones, then it precludes King from recovery. It is not quite so clear if the jury makes this finding against Miss Bones that it does not preclude Mrs. Haynes from recovering.

THE COURT: The Court confined its instruction on the matter of contributory negligence to Dorothy M. Bones and Bernard L. King. In outlining the questions that the jury should ask themselves, I pointed out they should determine first negligence, then proximate cause, then contributory negligence. The Court said affirmatively if they find contributory negligence on the part of Dorothy M. Bones, they should find for the defendant as against Dorothy M. Bones and Bernard L. King, and proceed to the question of damages with reference to the plaintiff Haynes.

I don't think I can make it any clearer. I am sure they will have some trouble about it but I have made it as clear as I can.

Do you have any other objections to the charge other than those already made and renewed for the record?

MR. KENNAHAN: No, Your Honor.

THE COURT: Mr. Casey, do you request any further charge?

MR. CASEY: Pursuant to Ridilia versus Kerns, 155 Atlantic 2d at 517, a 1959 case, in which our United States Court of Appeals granted
30 leave to appeal from a Municipal Court of Appeals decision and sua sponte approved that leave, therefore approving of the authority, I ask Your Honor since you have told the jury that the fact that Mrs. Haynes received sick leave benefits while she was absent and that that fact does not preclude her from recovering for lost earnings, that you tell the jury that they may consider the fact that she received sick leave in determining whether or not the absence was reasonably necessary as a result of the injury.

I also ask Your Honor to correct the instruction as given. I didn't refer to Mrs. Haynes, who is self-employed, in my argument on

that point but to the other two plaintiffs, one who is a government employee and the other who is a Washington Gas Light employee, both of whom received sick leave from their employers.

THE COURT: The Court will deny your request for further instruction.

MR. CASEY: That is the only additional request I have, Your Honor.

THE COURT: Do you have any objection to the charge as given?

MR. CASEY: I object to the charge I just referred to wherein Your Honor stated that I argued Mrs. Haynes had received sick leave and the instruction that she was entitled to recover for that absence
31 even though she had received sick leave benefits.

THE COURT: I do not believe I said Haynes; I referred to the plaintiff Bones in that connection.

Madam Reporter, will you look back in my charge and read that portion of it to me, please.

(An excerpt of the charge to the jury was read by the reporter.)

MR. CASEY: I am sorry. I think it was confined to Bones, Your Honor. I stand corrected.

THE COURT: Do you have any further objection to the charge?

MR. CASEY: Yes, I object to the charge that they can award the plaintiff Haynes for permanent injury since the only testimony that she was suffering from permanent injury was the testimony of Dr. Cox and based upon an examination which was reported to plaintiffs' attorney in a report dated June 28, 1962, which report was never furnished to the defendant pursuant to the pretrial order even though the pretrial order additionally observed that at the time of pretrial, the plaintiff was without a report supporting that claim.

I have nothing further, Your Honor.

THE COURT: Very well.

32 (In Open Court:)

THE COURT: When the witnesses were identified in this case, I anticipated that the case would take longer to try then it actually did. It is the Court's experience that in the average case of this kind, it takes a day to hear three witnesses so that if I see twelve witnesses, I think we have a four-day trial. This case has gone rather quickly for the number of witnesses. No one has succumbed to the virus, cold or pre-indulgence in the Christmas spirit and, consequently, having the first twelve jurors still remaining in the box, it will be unnecessary for the alternate to participate further in the case. I will ask you to take a seat in the courtroom.

(Alternate juror complied.)

THE COURT: Upon reaching your jury room, you will select one of your members to serve as foreman. The foreman will preside at your deliberations and speak for you in advising the Court of your verdict.

There is no time pressure upon you from the viewpoint of reaching a verdict in this case. At approximately a quarter after twelve if you have not reached a verdict, the Marshal will escort you to luncheon and after luncheon, you will return to the jury room to continue your deliberations. If you have not reached a verdict by approximately five o'clock, the Court will bring you back into the courtroom, caution

33 you not to discuss the facts in the case with anyone and excuse you until ten o'clock tomorrow morning when you will again return to the juryroom to continue your deliberations.

I tell you this, not knowing how long you will require to deliberate in this case, only to emphasize the fact that if you have not reached a verdict by approximately five o'clock, the Court is not going to lock you up and keep you here all night or anything of that kind. You will be released at approximately the same time that the Court closes every day to return tomorrow morning if that is necessary in reaching your verdict.

The jury may retire, Mr. Marshal.

(Whereupon, at 11:00 a.m., the jury retired to the jury room to commence its deliberations.)

THE COURT: Thank you, gentlemen. The Court will not require your continued presence here awaiting this verdict. If you will let the Clerk know where you can be reached by telephone within 15 or 20 minutes, you may be excused on that basis.

If there is no verdict by approximately quarter of five, I would suggest that if you want to be here when the Court sends the jury home for the evening, you come to the courtroom without waiting to be called. In other words, we won't call you to come down for the sending home
34 of the jury but you can come down on your own.

* * * * *

(Whereupon, at 3:30 p.m. the same day, the following proceedings ensued:)

THE COURT: Shortly after two o'clock, the Marshal was handed the following note from the jury room:

"Your Honor, the members of the jury would like to see photos of Mr. King's car and copy of the police officer's accident report."

At that time, the Court sent in to the jury room Plaintiffs' Exhibits Nos. 1 and 2 and Defendant's Exhibit No. 1, the police officer's report.

(Whereupon, the jury returned to the court room to return its verdict, as follows:)

THE DEPUTY CLERK: Are you the foreman of the jury?

THE FOREMAN: Yes, sir.

THE DEPUTY CLERK: Has the jury agreed upon a verdict?

THE FOREMAN: Yes, they have.

THE DEPUTY CLERK: In the complaint of the plaintiff Dorothy M. Bones against the defendant Helen I. Coolidge, do you find for the plaintiff Dorothy M. Bones or for the defendant Helen I. Coolidge?

35 THE FOREMAN: We find the defendant not guilty.

THE DEPUTY CLERK: In the complaint of the plaintiff Bernard L. King against the defendant Helen I. Coolidge, do you find for the plaintiff Bernard L. King or for the defendant Helen I. Coolidge?

THE FOREMAN: For the defendant.

THE DEPUTY CLERK: In the complaint of the plaintiff Dorothy L. Haynes against the defendant Helen I. Coolidge, do you find for the plaintiff Dorothy L. Haynes or for the defendant Helen I. Coolidge?

THE FOREMAN: For the defendant.

THE DEPUTY CLERK: Members of the jury, your foreman has said in the complaint of Dorothy M. Bones against the defendant Helen I. Coolidge that you find for the defendant Helen I. Coolidge and in the complaint of Bernard L. King against the defendant Helen I. Coolidge that you find for the defendant Helen I. Coolidge and in the complaint of Dorothy L. Haynes against the defendant Helen I. Coolidge that you find for the defendant Helen I. Coolidge, and this is your verdict so say you each and all?

(The jurors indicated affirmation.)

MR. KENNAHAN: May we have the jury polled, Your Honor?

THE COURT: You may.

36 THE DEPUTY CLERK: Members of the jury, I will repeat your verdict as stated by your foreman and then I will inquire individually of each of you if this is your verdict.

In the complaint of Dorothy M. Bones against the defendant Helen I. Coolidge, you find for the defendant Helen I. Coolidge; in the complaint of the plaintiff Bernard L. King against the defendant Helen I. Coolidge, you find for the defendant Helen I. Coolidge; and in the complaint of Dorothy L. Haynes against the defendant Helen I. Coolidge, you find for the defendant Helen I. Coolidge.

James G. Kiefer, Sr., is this your verdict?

JUROR KIEFER: Your Honor, I would like to ask one question. Should I answer yes or no?

THE COURT: That is correct. Is this your verdict?

JUROR KIEFER: Well, there is one --

THE COURT: Is this your verdict?

JUROR KIEFER: There is one part towards the last part I didn't quite get, I didn't understand too well.

THE COURT: Will you repeat the verdict, Mr. Clerk.

THE DEPUTY CLERK: In the complaint of Dorothy M. Bones against the defendant Helen I. Coolidge, you find for the defendant Helen I. Coolidge; in the complaint of Bernard L. King against the defendant Helen I. Coolidge, you find for the defendant Helen I. Coolidge;

37 in the complaint of Dorothy L. Haynes against the defendant Helen I. Coolidge, you find for the defendant Helen I. Coolidge.

James G. Kiefer, Sr., is this your verdict?

JUROR KIEFER: Yes.

THE DEPUTY CLERK: Mrs. Dorothy B. Akins, is this your verdict?

JUROR AKINS: Yes.

THE DEPUTY CLERK: Ben A. Crumlin?

JUROR CRUMLIN: Yes, sir.

THE DEPUTY CLERK: Albert E. Johnson?

JUROR JOHNSON: Yes.

THE DEPUTY CLERK: Miss Georgia M. Simpson?

JUROR SIMPSON: Yes.

THE DEPUTY CLERK: William M. Clark, Sr.?

JUROR CLARK: Yes.

THE DEPUTY CLERK: Miss Agnes A. Conniff?

JUROR CONNIFF: Yes.

THE DEPUTY CLERK: Mrs. Mackie E. Garrett?

JUROR GARRETT: Yes.

THE DEPUTY CLERK: Miss Helen L. Klassen?

JUROR KLASSEN: Yes.

THE DEPUTY CLERK: Miss Selma E. Allen?

JUROR ALLEN: Yes.

38 THE DEPUTY CLERK: James L. Haley?

JUROR HALEY: Yes.

THE DEPUTY CLERK: Carl Covington, Jr.?

JUROR COVINGTON: Yes.

THE DEPUTY CLERK: The jury has been polled, Your Honor.

THE COURT: Thank you, ladies and gentlemen of the jury, for the careful attention you have given to this case.

* * * * *

[Filed Dec. 19, 1962]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Dorothy M. Bones Bernard L. King Dorothy L. Haynes Plaintiffs. vs. Helen I. Coolidge Defendant	)	CIVIL NO. 712-60

VERDICT AND JUDGMENT

This cause having come on for hearing on the 17th day of December, 1962, before the Court and a jury of good and lawful persons of this district, to wit:

* * * * *

who, after having been duly sworn to well and truly try the issues between Dorothy M. Bones, Bernard L. King and Dorothy L. Haynes, plaintiffs and Helen I. Coolidge, defendant and after this cause is heard and given to the jury in charge, they upon their oath say this 19th day of December, 1962, that they find for the defendant against said plaintiffs.

WHEREFORE, it is adjudged that said plaintiffs take nothing by this action, that said defendant go hence without day, be for nothing held and recover of plaintiffs her costs of defense.

By /s/ William A. Heede
Deputy Clerk.

By direction of
EDWARD A. TAMM
Judge

HARRY M. HULL, Clerk

[Filed Dec. 28, 1962]

MOTION FOR NEW TRIAL

Come now the plaintiffs, Dorothy Bones, Bernard King and Dorothy Haynes, and move this Court to set aside each of the verdicts of the jury and judgments entered thereon returned herein December 19, 1962, and to grant a new trial for each of the herein plaintiffs on the following grounds:

1. The verdicts against each of the herein plaintiffs are contrary to the law.

2. The verdicts against each of the herein plaintiffs are contrary to the evidence.

3. The evidence in the case established and defendant admitted that she had told the police that the defendant ran her vehicle through a red light, clearly an act of negligence, and became thereby liable to plaintiff, Dorothy Haynes, a passenger in the vehicle operated by plaintiff Bones and owned by plaintiff King, entitling plaintiff Haynes to a verdict against the defendant.

4. The evidence in the case failed to show any contributory negligence on the part of the plaintiff Haynes, and she was therefore entitled to a verdict against the defendant whose primary negligence was established by the evidence.

5. The evidence on the issue of the contributory negligence of the plaintiff Bones, was totally insufficient to support the defendant's burden of proof on said issue and cannot sustain the verdict of the jury in favor of the defendant as to plaintiff Bones.

6. The evidence on the issue of the contributory negligence of the plaintiff Bones being totally insufficient to support the defendant's burden of proof on said issue, the verdict of the jury in favor of the defendant as to plaintiff King, the owner of the vehicle, likewise cannot be sustained.

7. The verdict of the jury herein against plaintiff Haynes appears to have been rendered as a result of the failure of the Court to make

clear to the jury that the contributory negligence of plaintiff Bones would not bar plaintiff Haynes from a recovery against the defendant. See affidavits of jurors annexed hereto as Exhibits A, B, C and D, which are, incorporated herein and made a part hereof.

8. The Court erred in refusing request of plaintiffs' counsel to clarify the law governing the passenger status of plaintiff Haynes. Plaintiffs' counsel, at the conclusion of the Court's charge, requested that the Court make clear that a finding by the jury against plaintiff Bones did not require a finding against plaintiff Haynes, a passenger. See Excerpt of Proceedings annexed hereto as Exhibit E, which is incorporated herein and made a part hereof.

9. The Court erred in refusing to further clarify the law of contributory negligence as it related to plaintiff Haynes, although acknowledging that the jury "will have same trouble about it. . ." See Exhibit E.

10. The Court erred in refusing to instruct the jury that the contributory negligence of plaintiff Bones would not be imputable to her passenger, plaintiff Haynes, as requested by plaintiffs' counsel. See Exhibit B; also see Exhibit A, B, C and D.

WHEREFORE, counsel for plaintiffs, for the grounds stated and for such other reasons as may develop upon hearing of the herein motion, move this Honorable Court to grant the herein motion for a new trial as to each of the plaintiffs, as the verdicts rendered herein are against the clear weight of the evidence and result in a miscarriage of justice.

Respectfully submitted,

/s/ John E. Kennahan

[Certificate of Service]

[Filed Dec. 28, 1962]

EXHIBIT A

AFFIDAVIT

I, James G. Kiefer, Sr., juror #183 in the case of Bones v. Coolidge, swear to the truth of the following:

1. That I found the driver Coolidge and the driver Bones both negligent.

2. That I was persuaded by my fellow jurors that inasmuch as there was a finding that both drivers were at fault that the passenger Haynes could not recover and that no special attention had been given to her status as a passenger.

3. That I was in doubt that the court had instructed us to find against the passenger, Mrs. Haynes, if there was a finding against her driver, Miss Bones. I requested clarification on this but the foreman told me that as both drivers were at fault, Mrs. Haynes, the passenger, could not recover.

/s/ James G. Kiefer, Sr.

[JURAT - Dated Dec. 20, 1962]

[Filed Dec. 28, 1962]

EXHIBIT B

AFFIDAVIT

I, Selma E. Allen, juror #2 in the case of Bones v. Coolidge swear to the truth of the following: The jury found both drivers negligent.

The Court did not instruct the jurors that we could give a verdict to the passenger, Haynes, if we found against her driver, Bones. If the Court did give this instruction I did not understand it nor did my fellow-jurors. Had we understood that a verdict could be returned for

the passenger although Miss Bones was negligent we would have done so.

/s/ Selma E. Allen

[JURAT - Dated Dec. 20, 1962]

[Filed Dec. 28, 1962]

EXHIBIT C
AFFIDAVIT

I, Mrs. Mackie E. Garrett, as juror #152 in the case of Bones v. Coolidge, found Mrs. Coolidge and Miss Bones guilty of negligence and contributory negligence, respectively, in the automobile accident in which they were involved on February 27, 1960.

In deliberating the case, I expressed the need for clarification of the Court's instructions as to whether, under such a finding, Miss Haynes could recover from the defendant, Mrs. Coolidge. I recommended that the foreman of the jury requst such clarification from the Court. The foreman and the majority of the other jurors stated, substantially, that it was their understanding from the instructions of the Court and prior experience in such cases that Miss Haynes could not recover from the defendant, Mrs. Coolidge under a finding that the driver of the car in which she was a passenger was guilty of contributory negligence. I accepted this interpretation of the law and thereafter gave no particular attention to passenger Haynes' claim.

Had I understood the Court's instructions to permit a verdict for Miss Haynes even though her driver was contributorily negligent I would have found a verdict for her.

/s/ Mrs. Mackie E. Garrett

[JURAT - Dated Dec. 21, 1962]

[Filed Dec. 28, 1962]

POINTS AND AUTHORITIES

Rule 59 Federal Rules of Civil Procedure.

/s/ John E. Kennahan

[Certificate of Service]

[Filed Jan. 14, 1963]

ORDER

Upon consideration of the Motion for new trial filed herein December 28, 1962, it is this 11th day of January, 1963,

ORDERED that the above motion be, and the same hereby is denied.

By direction of
Edward A. Tamm
Judge
* * *

[Filed Jan. 31, 1963]

NOTICE OF APPEAL

Notice is hereby given this 22nd day of January, 1963, that plaintiff, Dorothy L. Haynes, hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 19th day of December, 1962 in favor of defendant, Helen Coolidge against said Dorothy L. Haynes.

/s/ Joseph D. Bulman
Attorney for Plaintiff
* * *

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA

No. 17,721

DOROTHY HAYNES,

Appellant,

v.

HELEN COOLIDGE,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FRANCIS L. CASEY, JR.
800 Colorado Building
Washington 5, D. C.
Attorney for Appellee

HOGAN & HARTSON
Of Counsel

QUESTIONS PRESENTED

1. Is it error for a trial judge to deny an oral request for an additional instruction at the close of his charge to the jury, when the court has already fully and correctly instructed the jury on the same point, although in a different fashion? The appellant contends that it is error. The appellee contends that it is not.

2. Is it reversible error for the District Court to deny a motion for a new trial based on affidavits of three jurors impeaching their own verdict on the ground that deliberations in the jury room disclosed that some jurors misunderstood one part of the trial judge's instruction? Appellant contends that it is and appellee contends that it is not.

3. Did the District Court abuse its discretion in failing to grant appellant a new trial on the ground of confusion among the jurors in returning the verdict when the verdict was read verbatim before the poll of the jury and the first juror asked if this was his verdict explained that there was one part toward the end that he "didn't quite get," and when the verdict was again read verbatim, he said that was his verdict as did the eleven other jurors? Appellant contends that there was an abuse of discretion. Appellee contends that there was not.

INDEX

TABLE OF CASES

TABLE OF TREATISES, TEXTS, ETC.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,721

DOROTHY HAYNES,

Appellant,

v.

HELEN COOLIDGE,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

The appellant was a passenger in an automobile, that was driven by Dorothy M. Bones and owned by another passenger Bernard L. King, when it was in a collision with an automobile driven by the appellee. (J.A. 1, 2). All three occupants of Mr. King's automobile brought actions for damages arising from alleged personal injuries in one suit against the appellee. (J.A. 1, 2, 3).

The appellee pleaded the defense of contributory negligence to the claims of the driver and owner of the automobile in which the appellant was allegedly injured. (J.A. 4, 8, 9). In its charge to the jury the District Court gave the following instructions regarding that defense:

> "There is in this case, in addition to the charge of negligence made by these plaintiffs against the defendant a countercharge in which the defendant charges the plaintiff driver of the car with contributory negligence. What, then, is the definition of contributory negligence?
>
> "Contributory negligence is negligence on the part of the person complaining, that is, the plaintiffs or a plaintiff, which combining in some degree with the negligence of another helps in proximately causing the injury of which the plaintiff complains.
>
> "If you find that the plaintiff Dorothy M. Bones was guilty of contributory negligence, you should find for the defendant as between Dorothy M. Bones and the defendant and also for the defendant as to the plaintiff Bernard L. King for reasons which I will explain to you in a few minutes, because one who is guilty of contributory negligence may not recover from another for the injuries sustained.
>
> "To repeat this point, a person who is guilty of contributory negligence, that is, a person whose negligence contributes in any degree to the causing of an accident, may not recover from any other person who was negligent in that accident. This is the doctrine of contributory negligence recognized as the law in this jurisdiction." (J.A. 18, 19)
>
> * * *
>
> "The burden of proof to prove contributory negligence is, of course, upon the defendant under the requirements for burden of proof that I have previously outlined to you." (J.A. 19).
>
> * * *
>
> "To return for a moment to this matter of contributory negligence, you are instructed that because the plaintiff Miss Bones was driving an automobile owned by the plaintiff Mr. King with his permission,

she was by law his agent while driving the car and, therefore, any negligence or contributory negligence on her part must be imputed to him if you find her guilty of contributory negligence. For that reason, you must find for the defendant against the plaintiffs Bones and King in the event that you find that any negligence on the part of Miss Bones was one of the proximate causes of the collision.

"This is a general statement of the law of agency insofar as it applies to the operation of automobiles in the District of Columbia. We have a statute which says very concisely and very explicitly that anyone who operates an automobile with the permission of the owner is for legal purposes the agent of the owner and, consequently, the negligence of the driver of the automobile may be charged and is charged by law to the owner of the automobile." (J.A. 22).

* * *

"The Court has spent 45 minutes in defining various terms of law, various requirements of the law in an effort to assist you in reaching a verdict in this case. As a practical matter, how can you go about applying this 45-minute instruction to the facts in this case? I would suggest that, under your foreman's direction, you carry out a series of questions to yourselves somewhat like the following outline:

"Ask yourselves first: Was the defendant negligent? If your answer to this question is no, you find for the defendant, and that is the end of your responsibility. If however you answer this question yes, the defendant was negligent, then you ask yourselves a second question: Was the defendant's negligence the proximate cause of the injury to the plaintiffs? If your answer to this question is no, then your verdict is for the defendant. If your answer to this question is yes, then you go to the third question: Was the plaintiff Dorothy M. Bones guilty of contributory negligence? If your answer to this question is yes, then you find for the defendant against the plaintiffs Bones and King and go on to the question of damages as to the plaintiff Haynes. If your answer to this question is no, that is, the plaintiff Dorothy M. Bones was not guilty of contributory negligence, then you go to the question of damages as to all of the plaintiffs." (J.A. 27, 28). (emphasis supplied).

At the end of its charge to the jury, the District Court invited counsel to the Bench where the record was preserved as to prayers for instructions previously offered and denied and any objections to the charge previously made and both attorneys were asked if they had any requests for additional instructions or objections to the charge as given by the Court. (J.A. 29). When appellant's attorney was asked if he had any request for any further charge, the following transpired:

> "Mr. Kennahan: The only item that I think probably is not clear is this: It has been made quite clear that if there is a finding against Miss Bones, then it precludes King from recovery. It is not quite so clear if the jury makes this finding against Miss Bones that it does not preclude Mrs. Haynes from recovering. (emphasis supplied).
>
> "The Court: The Court confined its instruction on the matter of contributory negligence to Dorothy M. Bones and Bernard L. King. In outlining the questions that the jury should ask themselves, I pointed out they should determine first negligence, then proximate cause, then contributory negligence. The Court said affirmatively if they find contributory negligence on the part of Dorothy M. Bones, they should find for the defendant as against Dorothy M. Bones and Bernard L. King, and proceed to the question of damages with reference to the plaintiff Haynes. (emphasis supplied).
>
> "I don't think I can make it any clearer. I am sure they will have some trouble about it but I have made it as clear as I can.
>
> "Do you have any other objections to the charge other than those already made and renewed for the record?
>
> "Mr. Kennahan: No, Your Honor." (J.A. 29, 30).

The Court had already instructed the jury that there were three plaintiffs and three separate cases, all against one defendant before them and that when they returned with their verdicts, the foreman would be called upon by the clerk to announce an individual verdict in each case. (J.A. 28, 29). The jury returned an individual verdict

against each of the three plaintiffs. (J.A. 33, 34). At the request of the appellant and her fellow plaintiffs the jury was then polled:

> "The Deputy Clerk: Members of the jury, I will repeat your verdict as stated by your foreman and then I will inquire individually of each of you if this if your verdict.
>
> "In the complaint of Dorothy M. Bones against the defendant Helen I. Coolidge, you find for the defendant Helen I. Coolidge; in the complaint of the plaintiff Bernard L. King against the defendant Helen I. Coolidge, you find for the defendant Helen I. Coolidge; and in the complaint of Dorothy L. Haynes against the defendant Helen I. Coolidge, you find for the defendant Helen I. Coolidge.
>
> "James G. Kiefer, Sr., is this your verdict?
>
> "Juror Kiefer: Your Honor, I would like to ask one question. Should I answer yes or no?
>
> "The Court: That is correct. Is this your verdict?
>
> "Juror Kiefer: Well there is one —
>
> "The Court: Is this your verdict?
>
> "Juror Kiefer: There is one part towards the last part I didn't quite get, I didn't understand too well.
>
> "The Court: Will you repeat the verdict, Mr. Clerk.
>
> "The Deputy Clerk: In the complaint of Dorothy M. Bones against the defendant Helen I. Coolidge you find for the defendant Helen I. Coolidge, in the complaint of Bernard L. King against the defendant Helen I. Coolidge you find for the defendant Helen I. Coolidge; in the complaint of Dorothy L. Haynes against the defendant Helen I. Coolidge, you find for the defendant Helen I. Coolidge.
>
> "James G. Kiefer, Sr., is this your verdict?
>
> "Juror Kiefer: Yes." (J.A. 34, 35).

The other eleven jurors simply answered — "yes," when their names were called in the poll. (J.A. 35).

The appellant and her fellow plaintiffs then filed a motion for a new trial supported by affidavits from three of the jurors, that were obtained in two instances on the day following the return of the verdicts at 3:30 P.M. on December 19, 1962, and in the other instance on the second day following the return of the verdicts. (J.A. 33, 37, 39, 40). Appellee's attorneys were not at liberty to interview the discharged jurors and to seek contradictory or explanatory affidavits because of the ethical prohibition against such an effort. The motion for new trial was denied and this appeal followed. (J.A. 41).

SUMMARY OF ARGUMENT

The District Court's charge to the jury regarding the defense of contributory negligence was entirely proper and it did not contain any suggestion that that defense could defeat the appellant's action.

It would have been improper for the District Court to have set aside the verdict against the appellant on the impeachment of that verdict by three of the jurors who returned it. It is the settled rule in this jurisdiction as well as the general rule and prevailing federal rule that affidavits of jurors will not be entertained to impeach their verdict, unless those affidavits relate to extraneous influences brought to bear upon the jurors.

When the poll of the jury, confirming the verdicts announced by its foreman, was completed there was no apparent confusion among the jurors nor was there any attendant circumstance suggesting that further deliberation by the jury was in order. All twelve members had assented individually to the verdicts.

ARGUMENT

I

The Trial Judge's Instructions on the Defense of Contributory Negligence Were Entirely Proper.

Appellant's attack on the District Court's charge on contributory negligence does not cite any error in those instructions, but merely suggests how her attorneys believe they might have been improved.

When appellant's brief quotes from the portion of the instructions that she would have supplemented with a specific reference to Mrs. Haynes, it fails to indicate that the charge on contributory negligence did not stop there. That same paragraph of the charge went on to state:

> "For that reason, you must find for the defendant against plaintiffs Bones and King in the event that you find that any negligence on the part of Miss Bones was one of the proximate causes of the collision." (J.A. 22). (emphasis supplied).

The following paragraph explained the statutory basis for imputing the negligence of the driver of an automobile to the owner, with whose permission she was driving the car and later the trial court in outlining the issues to be resolved by the jury, instructed as follows after covering the question of whether the appellee was guilty of primary negligence:

> "If your answer to this question is yes, then you go to the third question: Was the plaintiff Dorothy M. Bones guilty of contributory negligence? If your answer to this question is yes, then you find for the defendant against the plaintiffs Bones and King and go on to the question of damages as to the plaintiff Haynes." (J.A. 28). (emphasis supplied).

In view of the foregoing and the court's earlier instructions to the jury that it was Miss Bones that was charged with contributory negligence and that if the jury should find that, in fact, Miss Bones was guilty of contributory negligence, the jury should find for the defendant, "as between Dorothy M. Bones and also for the defendant as to the plaintiff

Bernard L. King for reasons which I will explain to you in a few minutes * * *," (J.A. 18, 19) (emphasis supplied), appellant's suggested addition to the charge would have been redundant.

This Court has often held that it is not error for a trial court to refuse to give a requested instruction when the court has already correctly given the instruction in substance. Lippman v. Williams, 79 U.S. App. D.C. 334, 147 F.2d 150 (1945); Baltimore & Ohio R.R. v. Corbin, 73 U.S. App. D.C. 124, 118 F.2d 9 (1940); McCarthy v. Holmquist, 70 App. D.C. 334, 106 F.2d 855 (1939), and Madison v. White, 60 App. D.C. 329, 54 F.2d 440 (1931).

In Madison v. White, supra, this Court explained:

> "Furthermore, as said in Gleason v. Virginia Midland R.R. Co., 1 App. D.C. 187; it has been repeatedly determined, and needs no citation of authorities, that if the propositions of law are fairly and justly stated to the jury, and all points of requested instructions covered, the refusal of particular requests, though correct statements in themselves, is not error."

Here the appellant did not offer a prepared instruction on the point she raises on appeal. Her attorney merely observed that it was "not quite so clear," that contributory negligence was not to be imputed to the appellant. (J.A. 30). In view of the full and accurate instruction that had been given on that subject, it certainly was not error for the court below to refuse to repeat or restate any part of it.

II

The District Court Did Not Err in Denying Appellant's Motion for a New Trial Predicated on Affidavits of Three Jurors That Impeached the Verdict They Had Returned.

In refusing to grant a new trial on a motion grounded on affidavits of jurors that impeached their own verdict, the District Court ruled in accord with one of the most firmly established rules applicable to jury

trials. The public policy, in the interest of an orderly administration of justice, which prohibits jurors from impeaching their verdict is well expressed by language of the Supreme Court in McDonald v. Pless, 238 U.S. 264 (1915); which has been quoted and followed by this Court in Orenberg v. Thecker, 79 U.S. App. D.C. 149, 143 F.2d 375 (1944), and Economon v. Barry-Pate Motor Co., 50 App. D.C. 143, 3 F.2d 84 (1925):

> "[L]et it once be established that verdicts solemnly made and publicly returned into court can be attacked and set aside on testimony of those who took part in their publication and all verdicts could be, and many would be, followed by an inquiry in the hope of discovering something which might invalidate the finding. Jurors would be harassed and beset by the defeated party in an effort to secure from them evidence of facts which might establish misconduct sufficient to set aside a verdict. If evidence thus secured could be used, the result would be to make what was intended to be a private deliberation, the constant subject of public investigation — to the destruction of all frankness and freedom of discussion and conference." 238 U.S. at 267-68.

In Economon v. Barry-Pate Motor Co., supra, eight jurors joined in an affidavit which explained that they had found for the defendant only because they believed that a non-party was jointly responsible with the defendant and therefore, the defendant should not bear the burden of payment to the plaintiff alone. Our District Court refused to consider the affidavit and this Court affirmed, holding that:

> "In unmistakable language both this court and the Supreme Court of the United States have held the general rule to be that the testimony of jurors will not be received to impeach their verdict, unless such testimony relates to extraneous influences brought to bear upon them."

In Orenberg v. Thecker, supra, a new trial was sought by the losing party in a motion supported by the affidavits of several jurors which stated that two of the jurors had privately visited the scene of the accident and one of them had made observations, inspections and

experiments at the scene which both reported to their fellow jurors. The affidavits were rejected by the District Court in denying the motion for a new trial and this Court affirmed following McDonald v. Pless, supra, and Economon v. Barry-Pate Motor Co., supra. The same rule has been followed by this Court in a criminal appeal, Hyde v. United States, 35 App. D.C. 451 (1910), aff'd. 225 U.S. 347 (1912). In Fried v. McGrath, 77 U.S. App. D.C. 385, 135 F.2d 833 (1943), the general rule was observed, but held to be inapplicable where the affidavits did not impeach the jury's verdict, but simply explained what the verdict was, i.e., a verdict of $850 against both defendants rather than a verdict of $425.

Reviewing the Federal authorities no exception has been found to the statement that, "the general rule is, that affidavits of jurors will not be received to prove any mistake of the evidence or misapprehension of the law, on the part of the jury. * * * The verdict, in which they all concur, must be the best evidence of their belief, both as to the fact and the law, and therefore, must be taken to be conclusive." Bateman v. Donovan, 131 F.2d 759, 765 (9th Cir. 1942). In accord with this statement of the rule are the following authorities: Poindexter v. Groves, 197 F.2d 915 (2nd Cir. 1952); Department of Water and Power v. Anderson, 95 F.2d 577 (9th Cir.), cert. denied, 305 U.S. 607 (1938); Southern Pac. Co. v. Kling, 65 F.2d 85 (10th Cir.), cert. denied, 290 U.S. 657 (1933); Consolidated Rendering Co. v. New Haven Hotel Co., 300 Fed. 627 (D. C. Conn. 1924); 6 Moore, Federal Practice, ¶ 59.08 at 3811-12 (1953); 53 Am. Jur. Trial § 1106 (1945).

The inherent unfairness of an attack on a verdict, such as the appellant has made here may not be as patent as the disorder it would create in the administration of justice. Consider the position in which it places a party such as the appellee. She has been awarded a unanimous verdict that is consistent with her denial of any negligence that was a proximate cause of the accident. When affidavits of jurors are advanced

impeaching that verdict, she is denied the fundamental rights of offering evidence in the nature of cross-examination impeachment or rebuttal. Inquiry has confirmed her attorney's understanding that he is forbidden by the Canon of Ethics of his profession from interviewing the jurors.

Even though the foreman of the jury may protest to appellee's attorney of the harassment the jurors are undergoing on the evening of the verdict and on the following day and volunteer that the jury had found the appellee free of negligence, the appellee's attorney may not ethically make inquiry regarding the deliberations in order to meet the affidavits obtained from three of the twelve. Opinion 109, American Bar Association Standing Committee on Professional Ethics and Grievances; Informal Decisions 257 and 258 of the same Committee and Texas Opinion 26.

Because it is dispositive of appellee's attorney's ability to meet the attack on the verdict made by the appellant, A.B.A. Op. 109 is quoted in full as follows:

OPINION 109

(March 10, 1934)

"LAWYER'S CONDUCT TOWARD JURY — A lawyer ethically has no right, after verdict, to seek out one or more members of a jury before whom he has tried a case and question them concerning how certain aspects of the case impressed them, what they thought of certain evidence on both sides of the case, and how certain members of the jury stood on certain questions, even assuming that the lawyer did so for the purpose of informing himself as to any mistakes he may have made in the presentation of evidence or of testing his judgment in selecting members of the panel.

"A member of the Association has presented to the committee the following question:

The writer has been criticized for certain conduct in connection with jury trials; and I am submitting herewith a statement of facts with the request that you return an opinion thereon. After the jury had returned a verdict in cases in which the writer has been active in trying, the writer has made it a point to seek out one or more members of the panel and question them concerning how certain aspects of the case impressed them, what they thought of certain evidence on both sides of the case, and how certain members of the jury stood on certain questions. The writer was doing this for the purpose of informing himself as to any mistakes he may have made in the presentation of evidence, and also to test his judgment in selecting members of the panel.

It is my belief that most, if not all practicing attorneys, pursue the same course. Canon 23 of the Professional Ethics of the American Bar Association does not touch the point.

Canon 23
Opinions 37, 39, 49, 71, 77, 83

"The committee's opinion was stated by Mr. Carney, Messrs. Sutherland, Hinkley, Strother, Martin, Phillips and Harris concurring.

"The precise ethical question presented is whether or not it is professionally proper for a lawyer to interview, after verdict, jurymen who were on the panel as to what took place in the jury room and as to what the salient points were which caused the jury to arrive at a given verdict. The question assumes that the inquiries are directed by the lawyer for his own information and benefit. Before categorically answering the question, it would seem expedient, if not necessary, to cite a few of the numerous decisions in respect of the secrecy of the jury room and the immunity of jurors from interrogation as to their verdict.

"Previous to the nineteenth century, the earlier authorities might not have been uniform. Since the beginning of the nineteenth century, there probably has been no English case in which, after the return and affirmance of a verdict in open court, the testimony of jurors as to the motives and influences by which their deliberations were governed has

been admitted in court. Owen v. Warburton, 1 N.R. 326; Straker v. Graham, 7 Dowl. 223, 225; Burgess v. Langley, 1 D. & L. 21, 23; Raphael v. Bank of England, 17 C.B. 174; Standewick v. Hopkins, 14 L.J. (Q.B.) 16.

"Baron Alderson said in the Straker case that 'It is entirely against public policy to allow a juryman to make affidavit of anything that passes in agreement to a verdict.' This statement was quoted with approval by Chief Justice Tindal in the Burgess case.

"The cases in the United States are overwhelmingly to the same effect. (See Wigmore on Evidence (2nd Ed.), Vol. V, s. 2345-2358).

"In Woodward v. Levitt (1871), 107 Mass. 453, where will be found a collection of English and United States cases, the court said at p. 460, 'The proper evidence of the decision of the jury is the verdict returned by them upon oath and affirmed in open court; it is essential to the freedom and independence of their deliberations that their discussions in the jury room should be kept secret and inviolable; and to admit the testimony of jurors to what took place there would create distrust, embarrassment and uncertainty.' To the same effect see Clark v. United States (1933), 289 U.S. 1: 53 Sup. Ct. Rep. 465, where Mr. Justice Cardozo said at page 13: "For the origin of the privilege we are referred to ancient usage, and for its defense to public policy. Freedom of debate might be stifled and independence of thought checked if jurors were made to feel that their arguments and ballots were to be freely published to the world." The same judge said in the same case at page 16: "No doubt the need is weighty that conduct in the jury room shall be untrammeled by the fear of embarrassing publicity. The need is no less weighty that it shall be pure and undefiled. A juror of integrity and reasonable firmness will not fear to speak his mind if the confidences of debate are barred to the ears of mere impertinence or malice."

"It therefore may properly be concluded that the English cases, the cases of the various state courts, and the decisions of the United States Supreme Court, do not permit to be introduced into evidence discussions in the jury room, as to the manner in which a jury arrived at any given verdict. This conclusion is supported, as above pointed out, by reasons of ancient usage and public policy.

"Canon 23, among other things, provides that 'A lawyer must never converse privately with jurors about the case; and both before and during the trial he should avoid communicating with them, even as to matters foreign to the cause.' Many times it has been pointed out in our opinions that a lawyer, like Caesar's wife, should be above suspicion. See Opinions 37, 39, 49, 71, 77 and 83.

"If, after verdict, a juryman wishes to talk upon interrogation by one of the lawyers who tried the case, one or more ethical questions present themselves. As far as the juror is concerned, is he to be subjected to embarrassment as to what reasons led him and the other jurymen on the panel to arrive at a given verdict? As far as the lawyer is concerned, he is prying into deliberations which, by reason of public policy, should be inviolate. Further, in questioning a juror about the motives prompting the jury's verdict, he is indirectly soliciting disclosures about the conduct of other members of the jury without their consent. As a practical matter, what security has the lawyer that he is obtaining a fair representation of what took place in the jury room? If, as is likely to be the case, the juror, instead of relaying accurately the effect which the conduct of the lawyer produced, tempers it with charity, it may prove harmful instead of helpful. As far as the public is concerned may it not occur to them, especially where the attorney has pending other cases upon which the same panel of jurors may sit in judgment, that the lawyer is covertly attempting 'to curry favor with juries by fawning, flattery or pretended solicitude' contrary to the provisions of Canon 23.

"This opinion, of course, is not intended to extend to a situation where there has been a mistake in the announcing or recording of a verdict, and in the protection of his client's interests, it may be necessary for a lawyer to interview members of the jury to prevent a miscarriage of justice. Nor does it extend to a case where a juror has been guilty of fraud. See Clark v. United States, 281 U.S. 1, 53 Sup. Ct. Rep. 465. Compare note in 47 Harvard Law Review 717 (Feb., 1934) on United States v. Pleva, 66 F.2d 529 (C.C.A. 2d, 1933).

"The committee is of opinion that, upon facts stated, the conduct of the lawyer is unethical. It tends to destroy the secrecy which should, on account of ancient usage and public policy, safeguard the activities in the jury room."

The authoritative Drinker, Legal Ethics (1953), relying on A.B.A. Op. 109 and Texas Op. 26 states that:

> "A lawyer may not, even after verdict, seek out individually jurors and interview them as to what went on in a jury room, and as to what were the salient points deemed by them of importance in reaching their verdict, even though the lawyer's purpose has no relation to the case which they decided and is solely for the improvement of his jury technique. A lawyer may not write to or communicate with jurors either before or after trial. Jurors should conduct their deliberations and reach their verdict with assurance that, except for fraud, there will be no subsequent investigation by anyone of their deliberations."

At page 296 of Drinker, supra, Informal Decision 257 of the A.B.A. Committee is quoted as follows:

> "A lawyer may not write to or communicate with jurors before or after trial."

And Informal Decision 258 is also quoted:

> "Jurors should conduct their deliberations and reach their verdict with the assurance that, except for fraud, there will be no subsequent investigation by anyone of their deliberations."

Should it become the law of the District of Columbia that the District Court should have granted the appellant's motion for new trial, few verdicts will ever be the foundation of final judgments. Imagine the case where the attorney for the unsuccessful party cannot obtain one, two or three affidavits from jurors that the verdict would not have been unanimous if they had perfectly understood one facet of the court's charge. Keep in mind that the attorney for the prevailing party may observe the ethical prohibition against even interviewing that juror, and the resulting chaos is facilely foreseen.

III

Nothing That Occurred During the Poll of the Jury Warranted Granting Appellant's Motion for a New Trial.

Since appellant's motion for a new trial did not assign confusion during the poll of the jury as a ground for the requested relief and the point was not raised at any time prior to the expiration of the ten day period provided by Rule 59, Fed. R. Civ. P., the District Court should not have considered it. McCloskey v. Kane, 109 U.S. App. D.C. 217, 285 F.2d 297 (1960); Fine v. Paramount Pictures (7th Cir., 1950), 181 F.2d 300.

Further, the point was not preserved for review. The appellant did not move for a mistrial or to have the jury sent out for further deliberations or for any other relief before the jury was discharged.

It is not surprising that no issue was made regarding the propriety of the poll of the jury until a search was made for grounds upon which to attach the verdict. For all that appears, one juror did not adequately hear the last part of the clerk's reading of the verdict. When it was

re-read, he promptly said that that was his verdict,as did all of his fellow jurors.

Respectfully submitted,

FRANCIS L. CASEY, JR.
800 Colorado Building
Washington 5, D. C.

Attorney for Appellee.

HOGAN & HARTSON

Of Counsel